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TAKING PUBLIC RIGHTS PRIVATE: THE RHETORIC AND REALITY OF SOCIAL SECURITY PRIVATIZATION

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Abstract: This Article explores the foundations of the Social Security privatization debate. What is frequently portrayed as a numbers problem to which a "correct" answer can be found is in fact an ideological and political argument about wealth building versus direct income support and about the reality and security of public entitlement as opposed to private property rights. Efforts to use the idea of private property as the basis of rights in the context of the Social Security system and other non-retirement social welfare programs have proven problematic. This Article suggests that Social Security, far from being a quaint, retrograde souvenir of the New Deal, was ahead of its time in creating economic rights based on effort rather than equity in support of the public institution of broad-based retirement.

Starvation is the characteristic of some people not having enough food to eat. It is not the characteristic of there being not enough food to eat. . . . [S]tarvation statements translate readily into statements of ownership of food by persons. . . . Ownership relations are one kind of entitlement relations. . . . Each link in this chain of entitlement relations "legitimizes" one set of ownership by reference to another, or to some basic entitlement in the form of enjoying the fruits of one's own labour.

—Amartya Sen¹

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¹ AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 1-2 (1982).

INTRODUCTION: AESOP REVISITED

The problem of economic survival in old age and retirement is usually presented as a sort of modern day version of Aesop's fable of the grasshopper and the ant: the story of the thrifty and forward-looking ant who stored up grain during the producing season to eat during the barren time ahead, in contrast to the spendthrift grasshopper who merrily consumed all summer without putting aside anything and consequently faced starvation in the winter.² An onslaught of television and print advertising over the last decade seems designed to persuade younger Americans to follow the ant's example and save for the winter of unproductive old age.³

This advertising barrage has been accompanied by an equally insistent chorus from policy analysts and political leaders of all persuasions declaring the urgent need for "entitlement reform" to deal with the looming demographic disaster Social Security⁴ and Medicare⁵ are said to face when the baby boom generation begins to retire.⁶ The debate over Social Security reform covers a wide range of proposals, from preserving the existing system to replacing it with a

² AESOP'S FABLES, WITH A LIFE OF AESOP 121 (John E. Keller & L. Clark Keating trans., 1993).

³ The range and number of advertisements is extreme, consisting primarily of advertisements for various investment houses like the "Thank you Paine Webber" television campaign: "You may be able to live on love. But you definitely can't retire on it." 1999 TIAA-CREF Advertisment, SMITHSONIAN, Nov. 1999, at 23. In addition, magazines focusing on financial services routinely feature retirement savings as the principal reason for investment and savings. See, e.g., *Retire? Think Again. (Chances are you'll be working)*, U.S. NEWS & WORLD REP., June 2000, at 64-91.

⁴ The term Social Security will be used throughout this article to refer only to the cash benefits provided by the Old-Age, Survivors, and Disability Insurance ("OASDI") program. The Old-Age Survivors Insurance ("OASI") program provides benefits for retired workers and their spouses and children and to survivors of deceased workers. The Disability Insurance ("DI") program provides benefits for disabled workers and their spouses and children and pays for rehabilitation services for the disabled. See 42 U.S.C. §§ 401-434 (1994). While I will discuss the financing of these two trust funds together, there are issues of financing and eligibility specific to the disability insurance program that are not directly relevant to the focus of this article, which is the ideological and philosophical roots of arguments about income support for retirement. The analysis will therefore focus primarily on old-age benefits under Social Security.

⁵ Medicare refers generally to the Health Insurance program component of Social Security, as provided under Title XVIII of the Social Security Act. 42 U.S.C. § 1395 (1994). This Article will not address the issues surrounding the financing of Medicare, which are quite different from the financing issues facing the cash benefit programs.

⁶ See, e.g., PETER G. PETERSON, WILL AMERICA GROW UP BEFORE IT GROWS OLD? HOW THE COMING SOCIAL SECURITY CRISIS THREATENS YOU, YOUR FAMILY AND YOUR COUNTRY 21 (1996); SOCIAL SECURITY'S LOOMING SURPLUSES: PROSPECTS & IMPLICATIONS 5-10 (Carolyn L. Weaver ed., 1990).

system of private accounts with which individual workers would provide for their retirement and old age.⁷ Privatization of Social Security has recently surfaced as one of the few areas of sharp distinction between George W. Bush and Al Gore in the 2000 presidential campaign. Governor Bush has proposed a version of privatization as a centerpiece of his platform,⁸ while Vice President Gore has attacked

⁷ At one end of the spectrum are arguments for preserving the program as is and addressing its financial problems by "advance funding" benefits through accumulated payroll tax surpluses and paying down the overall national debt. Former Commissioner of Social Security Robert M. Ball has most prominently advocated this course of action, and some versions of this approach are discussed in HENRY J. AARON ET AL., *CAN AMERICA AFFORD TO GROW OLD? PAYING FOR SOCIAL SECURITY* 11 (1989). At the other end of the spectrum are proposals to eliminate the program completely in favor of a private account system in which workers would control the accumulation and investment of their own individual retirement savings accounts. The number of proposals to privatize Social Security in whole or in part, most of which are quite similar, is astonishing and too large to list here. Representative examples include: MARTIN FELDSTEIN, *THE MISSING PIECE IN POLICY ANALYSIS: SOCIAL SECURITY REFORM* 24 (National Bureau of Econ. Research Working Paper 5413, 1996) [hereinafter FELDSTEIN, REFORM]; PETER J. FERRARA, *SOCIAL SECURITY: THE INHERENT CONTRADICTION* 311 (1980); Laurence J. Kotlikoff, *Privatizing Social Security at Home and Abroad*, 86 AM. ECON. REV. 368, 370 (1996); Lewis D. Solomon & Geoffrey A. Barrow, *National Issues: Privatization of Social Security: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 9, 23 (1995); and Sylvester J. Schieber & John B. Shoven, *Social Security Reform: Around the World in 80 Ways*, 86 AM. ECON. REV. 373, 376 (1996). In between these two extremes are possible intermediate solutions, such as investing payroll tax revenues in the stock market and raising the retirement age to 70 or above, which represent variations on either private equity investments for the public program or preservation of the public program with reduced costs. In *FRAMING THE SOCIAL SECURITY DEBATE: VALUES, POLITICS, AND ECONOMICS* (R. Douglas Arnold et al. eds., 1998), a variety of authors discuss most of the middle of the road proposals. Proposals to maintain the current system but substantially modify it are contained in *THE REPORT OF THE 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY* (1996) [hereinafter ADVISORY COUNCIL REPORT]. The "modification" proposals, supported by a majority of Advisory Council members would (1) extend Social Security coverage to certain state and local government workers; (2) scale back the cost-of-living adjustment; (3) increase from 35 to 38 the number of working years taken into account in computing benefit levels; (4) accelerate the scheduled increases in normal retirement age; and (5) include benefits (net of the employee's share of payroll taxes previously paid) in the recipient's gross income and add the resulting revenue to the trust funds. See *id.* at 15-21. These proposals would have eliminated two-thirds of the then-projected long-term deficit in Social Security; under current projections based on the most recent estimates, discussed below, these proposals might be sufficient to eliminate the entire deficit.

⁸ Governor Bush has issued his proposal for partial privatization of Social Security in very general outlines on his web site devoted to the topic. See Republican Party, *Social Security Blueprint* (visited Sept. 24, 2000) <<http://www.blueprintforthefuture.com>>. While it is difficult to discern the precise contours of his proposal, the plan apparently contains some version of private savings accounts for individual workers, into which some portion of the current payroll tax revenues—perhaps one to two percent—would be diverted. See Robert D. Hershey Jr., *From Gore and Bush, Uncooked Retirement Stew*, N.Y. TIMES, June 25, 2000, at 3-14.

privatization and made preservation of Social Security a central theme of his campaign.⁹ Thus, Social Security bids to be a major focus of the new Administration and Congress in 2001.

The almost unspoken underlying goals of all of this concern about economic well-being in retirement are individual autonomy and the rejection of dependency, which in many ways are the hallmark American values that informs all public policy.¹⁰ Even those public programs that by definition operate through a dependency relationship—such as unemployment payments and welfare benefits for mothers with children—are touted as tools for ultimately reducing or eliminating dependency through re-integration of the beneficiaries into the work force.¹¹ Aesop's ant represents the quintessential independent individual who through hard work and thrift provides for

⁹ Vice President Gore proposes to maintain Social Security essentially in its current form and in addition proposes a supplemental plan to provide tax credits for amounts workers would save in individual accounts. See Hershey, *supra* note 8, at 3–14.

¹⁰ See, e.g., Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–28 (1998). Pildes states:

Much of American constitutional law is, of course, cast in the language of protecting individual rights: rights to free speech, or to equal protection, or to democratic participation—to vote, form parties, petition the government. . . . In the canonical text of rights-oriented liberalism, *Taking Rights Seriously*, Dworkin argued that rights protect individual interests by excluding appeals to the common good (majoritarian preferences) as a justification for limiting rights. . . . Rights must permit individuals to take an action "even if the majority would be worse off for having it done." This is the picture of the direct clash between the interests of individuals (in liberty, or dignity, or autonomy) and that of the community, with rights trumping the second to secure the first. . . . Dissenters from the recent efflorescence of constitutionalism in other countries have similarly echoed this critique of rights-oriented constitutionalism. For example, since the advent of the Charter of Rights and Freedoms in 1982, some Canadians have found the specter of Canadian constitutionalism uninviting, based on their perception of the American experience. Allan Hutchinson, a constitutional theorist, appeals to Canadians to reject constitutionalism altogether because a "rights-centred society becomes little more than an aggregate of self-interested individuals who band together to facilitate the pursuit of their own uncoordinated and independent life projects—a relation of strategic convenience and opportunism rather than mutual commitment and support." Charles Taylor, the philosopher, asserts that Canadian culture has traditionally been organized around the model of citizen participation and that the American model of rights poses a threat to that tradition.

Id. at 727–28 (citation omitted).

¹¹ See generally JOEL F. HANDLER & LUCIE WHITE, *HARD LABOR: WOMEN AND WORK IN THE POST WELFARE ERA* (1999).

herself without assistance and assures herself an unassailable entitlement to consumption when work is no longer possible.

The savings behavior epitomized by Aesop's ant is the path urged not only by those who would "privatize" the currently public entitlement of Social Security but also by those who support maintaining the program. Many defenders of the existing program assume that public equity in the form of advance funding through the payroll tax—as opposed to the private equity model of the private account proponents—is a possible and desirable basis for retirement as it has been entrenched in American society over the last half-century.¹² I propose in this article an alternative way of thinking about the problem of retirement income—one that rejects the assumption that adequate provision for retirement can rely on accumulated equity, either private or public, and that challenges the ideological messages imbedded in the current debate over how best to provide for the elderly who no longer work.

Social Security is a publicly defined, permanent and direct claim on—that is, a public entitlement to—some portion of future productivity, in the form of a stream of income at some point, either at or after the established retirement age, when each individual chooses to stop working. Indeed, the current formulation of the Social Security benefit calculation, based on a wage-indexed earnings record that brings old wages to current dollar levels at the time the calculation is made, guarantees that the retired worker's share of GNP in retirement will reflect her income position at the point immediately before retirement.¹³ This is a dynamic, rather than a static measurement. It is the assured permanence of the public entitlement to consumption, the guarantee of lifetime benefits that substantially reflect economic growth both before and after retirement, that enables workers at lower and middle income levels to take the risk of stopping work in early old age. The push to privatize Social Security represents an attempt to take this public claim private—fundamentally changing not

¹² See ALICIA H. MUNNELL, INTRODUCTION TO FRAMING THE SOCIAL SECURITY DEBATE: VALUES, POLITICS, AND ECONOMICS 1–2 (R. Douglas Arnold et al. eds., 1998).

¹³ Social Security old-age benefits are calculated for workers born after 1928 and retiring in 1991 or later using the highest 35 years of earnings up to the year in which the worker turns 62. Because the earnings records of prospective retirees are wage-indexed, that is, updated to current dollar levels in the year the worker reaches age 62, the benefit formula is applied to an earnings record reflecting economic growth over the worker's lifetime. Once the beneficiary begins receiving benefits, the annual cost of living increase guarantees the retiree at least an update in purchasing power, if not a full share of economic growth after retirement. See 42 U.S.C. § 415(i) (1994).

the overall size of the problem of support for the elderly generally, but rather, the size and income distribution of individual claims on future productivity.

Social Security also represents a spreading of individual claims across the generation of producing workers and a redistribution of income from high to low-wage workers and from the working to the non-working retired generation.¹⁴ In contrast, privatization constitutes a return to individual responsibility and risk and an apparent rejection of redistribution.¹⁵ As a result, if the entitlement to retirement income represented by Social Security was the foundation of mass retirement in the twentieth century, privatization very possibly would represent the end of the retirement expectation in the twenty-first century for all but the fortunate and the well-off who have weathered the economic risks that private accounts inevitably entail.¹⁶

¹⁴ See Eugene C. Steuerle & Jon M. Bakija, *How Social Security Redistributes Income*, 62 TAX NOTES 1763, 1764 (1994) ("Social Security is the largest transfer program in the United States, each year redistributing hundreds of billions of dollars between generations. It also reallocates the shares of income enjoyed by different income groups within each generation.") The limits of redistribution within the Social Security system as currently structured are well documented, and its shortcomings, particularly with respect to the differential benefits provided under the system to minority and women workers and to non-traditional family units, are important issues for discussion. It should be noted that the Social Security benefit system (and the assumptions of its founders that it would make most needs-based welfare obsolete) is based on assumptions about equal and free access to all levels of the paid labor force that may be admirable aspirations but that probably do not reflect reality for African-American, Latino and other minority workers, as well as to some extent for women generally. That problem is one of structure of the American economy and work force and is probably not possible to address within the structure of Social Security itself. In contrast, the problem of a benefit structure based on traditional family units is certainly amenable to resolution within the structure of the earned right entitlement concept. These issues, however, are beyond the scope of this article, although their resolution would likely be perfectly consistent with the discussion below of the importance of redistributive entitlements in the retirement context.

¹⁵ See AARON ET AL., *supra* note 7, at 117-20.

¹⁶ The history of the institution of retirement has been examined in some detail over the last 20 years. See, e.g., WILLIAM GRAEBNER, *A HISTORY OF RETIREMENT* 14 (1980). See generally THE COUNTRYSIDE IN THE AGE OF CAPITALIST FORMATION: ESSAYS IN THE SOCIAL HISTORY OF RURAL AMERICA (Steven Hahn & Jonathan Prude eds., 1985); THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY 1880-1990 (1998); CAROLE HABER & BRIAN GRATTON, *OLD AGE AND THE SEARCH FOR SECURITY: AN AMERICAN SOCIAL HISTORY* (1994); DAVID HACKETT FISCHER, *GROWING OLD IN AMERICA* (1978). However, the future of retirement as an institution of the lower and middle classes, not simply of those with private means to support leisure in middle and old age, has not received much attention in the current Social Security debate. This is a discussion that needs to be conducted and will be the focus of a future article; however, this article is confined to an analysis of the current debate over Social Security and how best to finance the existing institution of retirement.

The problem with basing retirement systems on the equity model is that equity inevitably involves risk of loss or inadequate value, either of which might result in an insufficient future stream of income. These risks are intrinsically incompatible with the modern institution of mass retirement, regardless of individual willingness to undertake risky investment in order to have a chance at immoderate gain. Nonetheless, if the issue were simply a question of each individual's provision for her own old age, the American cultural imperative of autonomous action in a free market economy might sway the national (if not the global) debate in favor of individual risk-taking in a privatized personal account system.

However, since the onset of industrialization in the nineteenth century, and especially since World War II, retirement has become much more than an individual option available to the well-off minority. The social policy of retirement was actively promoted both by private employers and public support systems. In the post World War II era it became a cultural institution in its own right, satisfying public, private, individual and corporate needs.¹⁷ Social Security was designed as the cornerstone of this social policy, not only as insurance for individuals against their own economic need, but more importantly as a solution for the social instability threatened in times of economic crisis by inequality of economic opportunity during a working life.¹⁸

The program's guaranteed income redistributive benefit formula promotes prevention rather than alleviation of poverty in old age and extends the expectation of retirement to all income levels. Thus, the argument over whether to "privatize" Social Security is in reality a debate over the future of mass retirement itself. While no one advocating privatization has so far admitted it publicly, such proposals constitute a step in the direction of eliminating middle class retirement as a labor force management tool, substituting in its place an economic old age lottery in which retirement would once again become a hope rather than an expectation.

The institution of mass retirement, I argue here, can realistically only be supported by a public entitlement to an income stream when full-time paid employment ends.¹⁹ Only a public entitlement directly to a share of economic productivity at the time it is necessary to support consumption, as opposed to a private equity investment with

¹⁷ See *infra* notes 199–235 and accompanying text.

¹⁸ See *infra* notes 199–235 and accompanying text.

¹⁹ See *infra* notes 270–283 and accompanying text.

variable economic returns, can induce the cessation of work on a mass scale and the continued democratization of retirement as an expectation of workers at all income levels. It is not a question of whether we have sufficient socio-economic resources to support retirement—it is a question of how those resources are to be distributed.

The discussion of Social Security and retirement income security has focused, in many ways, on the concrete results of privatization proposals as if those results were both measurable and predictable. In fact, both the advantages and disadvantages of privatization are a matter of long-term economic and demographic estimates and political opinion, rather than of science. Thus, a principal purpose of this Article is to set aside the essentially uncertain predictions about the consequences of privatization and to refocus the debate on the real political and theoretical disagreements at issue.

The most interesting aspect of this debate may be the enduring power and ultimately limiting impact of the ideology of private property rights for both proponents of privatization and for supporters of redistributive entitlements.²⁰ The expression of all rights as a form of property ultimately leads to a dead end in which individual autonomy "trumps" socially conceived solutions to socially defined problems.²¹ The terms in which the Social Security debate has been framed disguise the real argument, which is about the supremacy of market ideology, concomitant resistance to redistribution of income, and the transformation of all social rights and values into species of private property.²²

Such a framework for legal analysis is the theoretical and ideological expression of the "winner take all" character of early twenty-first century market capitalism. Social Security can be seen as a counterweight to the excesses of "pure" market capitalism. Indeed, I would argue that it is quite necessary to the functioning of the market system not, as privatization advocates appear to believe, antithetical to it.²³

The debate over Social Security and privatization is a struggle not just about private investment versus socialized responsibility but about ways of thinking about how the problem of old age income support

²⁰ See *infra* notes 267–283 and accompanying text.

²¹ See Pildes, *supra* note 10, at 727–28.

²² See *infra* notes 143–144 and accompanying text.

²³ For a thorough discussion of the distorting effects of "winner take all" economics in the setting of the income tax, see generally Martin J. McMahon & Alice Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1 (1998).

should be framed and the invasion of all aspects of life by the profit imperative. Encouraging thrift and savings, in the manner of Aesop's ant, is in itself a relatively benign prescription. In contrast to the current preoccupation of the media and policy analysts, however, I would argue that being and thinking like a money manager—the role constantly urged on the public by advertisers and politicians—should not be a prerequisite for participation in society and security in old age and in fact is likely to be a hindrance to the creation of a more secure and humane society for more than the privileged few.²⁴

This Article will explore the theoretical, rhetorical and ideological foundations of the Social Security privatization debate. It will demonstrate that what is frequently portrayed as a numbers problem to which a "correct" answer can be found is in fact an ideological and political argument about wealth building versus direct income support and about the reality and security of public entitlement as opposed to private property rights.²⁵ First, I explore arguments presented by those who advocate a private account system as a replacement for Social Security, examining both the criticisms of Social Security itself and the suggested advantages of a private system over the public system. This analysis shows that an attachment to the principle of private property as the source of economic rights is the common element in all of the arguments made and that, in the absence of compelling economic evidence supporting privatization, the real argument is a political and ideological one about public versus private rights and income rights versus wealth accumulation.

Next, I discuss the problems inherent in using the idea of private property as the basis of rights in the context of the establishment and explanation of the Social Security system itself and in the context of non-retirement social welfare programs proposed in the work of Charles Reich and others.²⁶ In light of the failure of the courts to expand on Reich's notion of welfare as property, succeeding analysts have attempted to develop a different justification for redistributive justice—one that sees actual property redistribution as a way to insure access to

²⁴ For an example of the current preoccupation with inducing widespread participation in investing and the stock market, see James A. Fanto, *We're All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education*, 49 CASE W. RES. L. REV. 105, 107 (1998).

²⁵ See *infra* notes 143–172 and accompanying text.

²⁶ See generally Charles H. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter Reich, *New Property*].

civic and economic opportunity.²⁷ The failure of these efforts as well as the misleading private pension analogy used to sell the Social Security program from the New Deal forward are directly attributable to the distorting effect of the insistence on individual property rights as the basis for economic rights.²⁸

Finally, I set forth an alternative analysis of economic rights in the retirement context, suggesting that Social Security, far from being a quaint, retrograde souvenir of the New Deal, in fact was ahead of its time in creating economic rights based on effort rather than equity in support of the public institution of broad-based retirement.²⁹ As ideas about the nature of property itself continue to change, particularly in the context of technological developments such as the Internet, property and ownership may give ground to effort and access as the basis of economic rights in the future.³⁰ In any event, I propose that the public entitlement of Social Security is indispensable if the institution of retirement, which fundamentally relies on each individual's permanent entitlement to income until death as a way to induce that individual to stop working, is to last very far into the twenty-first century.

I. THE PRIVATIZATION ARGUMENT: SMART MONEY

The debate over "privatizing" Social Security, in one form or another, has been raging for at least thirty years since Martin Feldstein's theories on the effects of Social Security on the national savings rate first began to garner attention.³¹ Each side in policy discussions about the future of public retirement programs tends to cast the argument as one about demonstrable truths—numbers of elderly workers, effects of public transfer programs on investment, savings and the economy, etc. The introduction of Social Security into the 2000 presidential campaign in the form of George W. Bush's partial privatiza-

²⁷ See *infra* notes 188–189 and accompanying text.

²⁸ See *infra* notes 184–266 and accompanying text.

²⁹ See *infra* notes 271–287 and accompanying text.

³⁰ For a discussion of the struggles to delimit property rights on the Web, see generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998), and Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998).

³¹ Martin S. Feldstein, *Social Security, Induced Retirement and Aggregate Capital Accumulation*, 82 J. POL. ECON. 905 (1974) [hereinafter Feldstein, *Social Security*].

tion proposal speaks volumes for the continuing vitality of the debate.³²

However demonstrable some of the truths appear to be, the argument is far from settled and economists differ among themselves, as do policy makers generally, as to the economic effects of social insurance and the costs and benefits of private savings as an alternative to social insurance.³³ It is the subtext of this debate that is more interesting and illuminating. The ideological, philosophical and cultural underpinnings of both sides of the argument reveal common goals and, more importantly, common conceptions about rights and economic entitlements held both by those who would privatize Social Security and those who would preserve it as it is today. For purposes of mapping this "deep structure" of the privatization argument, I focus first on the basic tenets of the case for privatization, as argued in various representative pieces by political and academic figures, examining both the arguments made and the principles and rhetoric in which those arguments are grounded.³⁴

A number of versions of the privatization case have been made over the last several years, and all are based on the same general proposition: individual accounts invested in equities (principally the stock market) are superior as a retirement income system to the public income transfer entitlement.³⁵ As will be clear in the discussion that follows, there is no conclusive or universally accepted economic argument to settle the issue. Thus, it would be easy to dismiss the entire debate as "political" and to attribute motives of bald self-interest to each side: opposition to redistribution and a "winner takes all" unbridled greed on the part of the privatization advocates and self-interested preservation of government subsidies for the elderly on the part of supporters of Social Security. Clearly such motives are present on each side, but they are not the whole story. It is possible, by peeling back the layers of the most commonly presented arguments in

³² See Hershey, *supra* note 8, at 14. Columnists have weighed in on both sides. See, e.g., Molly Ivins, *Social Security Plan Depends on Details Bush Won't Divulge*, MINNEAPOLIS STAR-TRIBUNE, May 26, 2000, at A23; William Safire, *Grab That Third Rail*, N.Y. TIMES, June 26, 2000, at A17.

³³ Karen Burke & Grayson M.P. McCouch, *Privatizing Social Security: Eight Myths*, 74 TAX NOTES 1167, 1167-73 (1997).

³⁴ See generally FELDSTEIN, REFORM, *supra* note 7; Solomon & Barrow, *supra* note 7; Don Nickles, *Policy Essay: Retiring in America: Why the United States Needs a New Kind of Social Security for the New Millennium*, 36 HARV. J. ON LEGIS. 77 (1999).

³⁵ See generally FELDSTEIN, REFORM, *supra* note 7; Solomon & Barrow, *supra* note 7; Nickles, *supra* note 34.

favor of privatization, to see the bones of the debate—core beliefs about property, economic rights and individual autonomy—that both unite and divide the contestants.

A. *The Privatization Critique of Social Security*

The critics' analyses of the inadequacies of the social insurance system focus both on internal design flaws that make the system inadequate to meet the retirement needs (they argue) of the twenty-first century and on apparent effects of the program on the economy and society as a whole. Most criticisms fall into four general categories. First, there is concern about the coming demographic "disaster" of the baby boom generation's retirement, with fewer workers to fund more retirees who can be expected to live longer lives.³⁶ Second, there are "rate of return" issues (that is, comparison of taxes paid to benefits paid out to each individual) with concern focused on Social Security's inefficiency in targeting benefits, the inadequacy of benefits for the low-paid as well as for some of the high-paid, and its combination of "insurance" and "welfare" functions.³⁷ Third, there is concern about the overall expense of paying for Social Security and the share of the federal budget (and national economy) that will be devoted to income maintenance programs for the elderly and the problem of Social Security's "unfunded liability."³⁸ Fourth, there is concern that a publicly funded retirement program, financed on a pay-as-you-go basis, discourages private savings for retirement.³⁹

The first and third areas of concern deal with the financing of retirement on a generational basis. The second focuses on "equity versus adequacy," a long-standing debate about the redistributive Social Security benefit structure. The fourth area of concern, the depression of the national savings rate, deals not with how well Social Security meets the goals of insuring retirement, but rather, with the detrimental effects of public income transfer programs generally.⁴⁰ These economic and demographic arguments, however, are only the outward manifestations of the same set of assumptions and concerns—an atomistic, individualized approach to problems created by demographic and social phenomena (an aging population in the in-

³⁶ See *infra* notes 41-79 and accompanying text.

³⁷ See *infra* notes 80-109 and accompanying text..

³⁸ See *infra* notes 110-130 and accompanying text.

³⁹ See *infra* notes 131-144 and accompanying text.

⁴⁰ Feldstein was the first to propose this effect primarily for Social Security. See generally Feldstein, *Social Security*, *supra* note 31.

dustrialized world coupled with the cultural expectation of retirement at age sixty-five) and a related attachment to individual property rights (and resistance to redistribution of them) as the only sure source of economic growth and security during working life and in old age.

1. Baby Boom Retirement Disaster

For many who advocate private accounts as a viable substitute for Social Security, the system's problems largely originate with the aging of the baby boom generation—the demographic basketball in the python.⁴¹ The generation born roughly from 1946 through 1960 in the industrialized world greatly outnumbers the generations born in the 1920s and 1930s and during the war years of the 1940s; as a result, the ratio of workers supporting non-working elderly will drop from the three workers for each retiree during the period from about 1960 to 2010 to two workers or fewer for each retiree by 2030.⁴²

The current Social Security financing structure is commonly described as “pay-as-you-go,” referring to the fact that the system is generally not funded in advance. Almost all of the payroll tax revenues currently being collected from workers and their employers are used to pay benefits in current pay status. Any surpluses, which the system has generated each year since the late 1980s, is accounted for as a reserve in the Social Security trust funds, which are held in the form of U.S. government bond obligations.⁴³

The language used to describe the baby boom retirement phenomenon frequently evokes the feeling of impending doom; in addition to the drop in the reproduction rate of the baby boomers themselves, increases in life expectancy and advances in medicine add up to a demographic tidal wave of elderly retirees.⁴⁴ Senator Don Nickles

⁴¹ The fertility rate (number of children per woman) increased during the period of 1945 to 1960. See 2000 BOARD OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS., ANN. REP. 63 (b1.11.D2 (2000) [hereinafter ‘TRUSTEES’ REPORT]).

⁴² Nickles, *supra* note 34, at 84.

⁴³ See Burke & McCouch, *supra* note 33, at 1167–73.

⁴⁴ See Philip J. Longman, *Financing the Future: Is Social Security the Problem or the Solution?*, in SOCIAL SECURITY AND THE BUDGET PROCEEDINGS OF THE FIRST CONFERENCE OF THE NATIONAL ACADEMY OF SOCIAL INSURANCE 63–64 (Henry J. Aaron ed., 1990) (stating: “As the ranks of the elderly swell in the next century, those of children will diminish. . . . What will happen when this anomalously large [baby boom] generation reaches old age, and begins to consume far more than it produces?”); see also Peter G. Peterson, *The Morning*

focused on this worker-to-retiree ratio problem in a 1999 article advocating private accounts as a substitute for Social Security:

The population of Americans aged sixty-five and over increased eleven fold from 1900 to 1994, compared with only a threefold increase of those under age sixty-five. The population of those eighty-five and older will more than double between 1994 and 2020 to 7 million, and reach 19 million by 2050. . . .

Social Security depends on today's workers to pay for today's retirees. The future of the system and the benefits due today's workers in their retirement depends heavily on the government's ability to tax future generations. Thus, understanding these changing demographics is key to understanding why the system is in trouble.⁴⁵

The worker-to-retiree ratio is usually put forward as the first and principal problem with the current Social Security system—that is, too few workers paying in to support projected numbers of retirees. There are many reasons for the projected drop (under the intermediate set of assumptions) from the current 3.4 workers to each retiree down to just over two workers for each retiree by 2030.⁴⁶ The large baby boom generation is only part of the picture, of course. The substantial drop in fertility rates between 1960 and 1976 coincided with the beginning of widespread use of oral contraceptives and deferral of childbearing by women now entering the paid work force in larger numbers.⁴⁷ For a short while in the 1980s the baby boom generation was not even replacing itself, although fertility has rebounded in more recent projections.⁴⁸

These demographic issues are not confined to the United States; Japan currently has the same worker-to-retiree ratio that the United States will experience by 2020.⁴⁹ Western European countries—which

After, ATLANTIC MONTHLY, Oct. 1997, at 43, 43–69. The subtitle of the article is *Consuming Our Children*.

⁴⁵ See Nickles, *supra* note 34, at 85 (citations omitted).

⁴⁶ See TRUSTEES' REPORT, *supra* note 41, at 21–22.

⁴⁷ See *id.* at 60, 63 tbl. II.D2. The fertility rate reached a peak of 3.61 in 1960, declining to as low as 1.74 in 1976, but rising again to its current rate of 2.06 in 1999. See *id.* at 63 tbl. II.D2.

⁴⁸ See *id.* at 60.

⁴⁹ See AGING SOCIETIES 3 tbl.1–1 (Barry Bosworth & Gary Burtless eds., 1998) (finding that the aged dependency ratio in 2000 is 25.1 in Japan, 18.7 in United States, and in 2020 will be 43.2 in Japan, 24.8 in United States).

long before the United States established more extensive social welfare and social insurance programs dealing with a wide range of issues—face similar demographics and, in some cases, more severe drop-offs in birth rates than are projected in the United States.⁵⁰ Many of these countries are beginning to question the resources devoted to their broad social welfare structures and to investigate private market alternatives.⁵¹

The demographic issue in the United States is normally presented as a question of simple, common sense math: if there are fewer workers supporting each retiree, then the corresponding tax burden on each worker will have to increase. The critique usually stops there, the implicit corollary being that increasing taxes is per se wrong-headed and economically disastrous, no matter what the reason. The systemic criticism embedded in the demographic disaster narrative is that a pay-as-you-go system, in which each generation of workers pays for the retirement benefits of the then-current generation of retirees, cannot be sustained if the retiree generation constitutes an out-sized burden on a comparatively smaller working generation.⁵²

It is the way in which the demographic problem is framed and explained that is of particular interest here: each worker's responsibility for supporting the non-working elderly is spelled out as a matter of individual tax burdens that she may or may not choose to undertake. Solomon and Barrow write: "Each generation must finance its parents' retirement on the faith that its children, in turn, will have the benevolence and capacity to fulfill their social obligation."⁵³ Solomon and Barrow make this statement as a specific criticism of Social Security's financing mechanism in the face of what they imply is an impending demographic disaster. The unstated assumption seems to be that providing for elderly parents is a voluntary obligation that is widely and freely rejected by children in both individual and social contexts.

It is unclear, however, whether these demographic issues would in any way be addressed by an equity-based retirement system supported by these same critics as the necessary substitute for the pay-as-you-go

⁵⁰ See *id.* at 4 tbl.1-2 (finding the fertility rate in France was 1.8, in Germany was 1.3, and in the United Kingdom was 1.8, compared to 2.1 in the United States, in 1990-95).

⁵¹ See Lee A. Sheppard, *News Analysis: Stripping Social Security of its Redistributive Features*, 73 TAX NOTES 1012, 1015 (1996) [hereinafter Sheppard, *News Analysis*].

⁵² See Solomon & Barrow, *supra* note 7, at 15.

⁵³ *Id.*

social insurance model.⁵⁴ A private account system must be based on the assumption that a property right, an entitlement to equity sufficient to support an income stream to the end of life, is necessary to assure retirement income security. Privatization advocates are generally highly critical of the lost opportunity for wealth-building represented by FICA taxes used to pay Social Security benefits, money they would rather keep and invest themselves to satisfy their own individual retirement needs.⁵⁵

Yet there seems to be no question that the nation as a whole will have the capacity to produce sufficient goods and services to satisfy at least the basic needs of all its working and non-working members throughout their lives. Thus, the adequate care of elderly baby boomers in the aggregate should be perfectly possible. The question is how the benefits—that is, the share of consumable goods and services—will be *distributed among* the elderly. Since in a pay-as-you-go system payroll taxes pay for current consumption of goods and services by the beneficiary population, those taxes would probably have to increase to provide for a larger and longer-lived generation, unless productivity so greatly increased average wages that equivalent additional revenue would be raised by the same tax rate. While the payroll tax is regressive, higher wage workers nonetheless pay higher levels of FICA taxes. Moreover, if additional revenue has to be raised within the payroll tax structure, likely measures would include increasing the taxable wage base without a concomitant increase in benefits or using some portion of general tax revenue raised by the progressive income tax, both of which impose a greater burden on high income than on low income taxpayers.⁵⁶

⁵⁴ See *id.*

⁵⁵ For example, according to the Bush campaign:

[I]nstead of dramatically raising taxes or cutting benefits, individual workers could be permitted to establish personal retirement accounts. By allowing younger workers to invest a portion of their payroll taxes in stocks and bonds, these accounts will generate higher rates of return, thus helping to increase retirement income for younger workers. . . . In addition to worsening rates of return, the current structure of the Social Security system impedes, rather than enhances, wealth creation.

The Republican Party, *A Blueprint to Strengthen and Improve Social Security* (visited Sept. 28, 2000) <<http://www.blueprintforthefuture.com/pdfs/ssblueprint.pdf>> [hereinafter Republican Party, *Blueprint*].

⁵⁶ See generally Steven C. Wilber, *ACCF Center for Policy Research Compares Social Security Reform Proposals*, 81 TAX NOTES 1667 (1998) (summarizing current reform proposals).

It is not simply the prospect of more elderly retirees in itself that necessarily alarms private account advocates. Rather, it is the likely solutions for payroll tax shortfalls in providing benefits for those elderly that create issues of fairness from their perspective. The impact of additional taxes probably would fall more heavily on higher-wage workers, inevitably resulting in a redistribution from the hard-working ants to the less fortunate or (depending on your perspective) more lazy grasshoppers of the human work force.⁵⁷ The demographic projections of a larger elderly population being supported by a working generation that will be comparatively smaller than in the past create a problem for privatization supporters because they imply higher tax burdens on higher wage workers—a greater degree of redistribution from higher income workers to lower income retirees.⁵⁸ Such redistribution also contributes to the second general problem cited by privatization supporters: the poor “rate of return” on payroll taxes paid into Social Security as well as helping to diminish the private accumulation of capital.⁵⁹

Few supporters of Social Security argue with the range of projections contained in the annual Trustees’ Report, which is based on three sets of demographic (and economic) assumptions: the low-cost, or optimistic set; the intermediate set, which are the figures used by most government policymakers to make decisions on Social Security issues; and the high-cost, or pessimistic, set of assumptions.⁶⁰ For purposes of determining actions affecting the next thirty years, current and past fertility and mortality rates, unlike most of the other issues in the privatization debate, are primarily a matter of calculation, not judgment. The generation that will reach what have traditionally been considered peak earning years at the time the baby boom generation is due to retire has already been born. Therefore, calculating how many workers there will be for each retiree in the 2015–2035 period is a matter more of mortality rates of both generations than of birth rates.⁶¹

However, there are many demographic factors and uncertainties that may play a significant role in determining how many workers will be bearing the payroll tax burden for Social Security in the longer

⁵⁷ See AARON ET AL., *supra* note 7, at 117.

⁵⁸ See Gene Steuerle, *The Simple Arithmetic Driving Social Security Reform*, 78 TAX NOTES 377, 377–78 (1998).

⁵⁹ See *infra* notes 80–109 and accompanying text.

⁶⁰ See TRUSTEES’ REPORT, *supra* note 41, at 19–29.

⁶¹ See *id.* at 21–22 fig.1.G2.

term future, and the choice among even minor variations on these assumptions can make all the difference in the projected size of the financial problems of the system. For example, the extent of future immigration into the United States is a critical, yet somewhat unpredictable, factor. While the industrialized Western European, Asian and North American populations are aging, the populations in other parts of Asia, and most of Africa and the Middle East, as well as parts of South and Central America, are experiencing much higher fertility rates and have much younger populations.⁶² As a result, it can be argued that one approach the industrialized nations can take is to allow immigration of younger workers to make up for any dearth of native born workers and, as a result, shore up the total payroll tax wage base.⁶³ The United States, despite its heritage as a "nation of immigrants," historically has alternated periods of xenophobia with periods of relaxed immigration standards to meet industrial and agricultural labor needs.⁶⁴

Even if the conservative immigration assumptions contained in the 2000 Board of Trustees of the Federal Old-Age & Survival Insurance & Federal Disability Income Trust Fund Annual Report ("2000 Trustees' Report") are accepted, there are nonetheless several factors that may indicate less than catastrophic consequences of the aging of America.⁶⁵ First, the math is really not as simple as it appears, as the payroll tax is not a head tax but rather a tax on wages and thus indirectly on productivity. It is clearly a regressive tax, as it applies the same percentage rate to all wage levels and does not tax wages above the taxable wage base at all. However, if productivity increases and wages rise, as most economists would expect to happen when there are fewer workers in the labor force, the impact of any tax increase needed to cover rising outlays in Social Security benefits will be less severe. Such expectations are part of the low-cost or optimistic set of the 2000 Trustees' Report assumptions, under which Social Security

⁶² See POPULATION DIVISION OF THE U.N. SECRETARIAT, *WORLD FERTILITY PATTERNS* 1997, U.N. Doc. ST/ESA/SER.A/165 (1997), available in *World Fertility Patterns 1997* (visited Nov. 6, 2000) <<http://www.undp.org/popin/wdltrends/fer/fermap.htm>>.

⁶³ *Id.* at 37-38. ("Increased immigration affects the cost of Social Security much like increases in birth or mortality rates—it increases the ratio of workers to retirees.")

⁶⁴ For a thorough exploration of the uses and misuses of immigration laws and changing conceptions of citizenship in America, see generally ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

⁶⁵ See TRUSTEES' REPORT, *supra* note 41, at 13, 62, 63, 64.

incurs no significant financial problems throughout the 75-year projection period.⁶⁶

Of course, the payroll tax has for the last several years raised far more revenue than necessary to pay for current benefits, and the surplus amounts have been recorded as accumulated in the Social Security trust funds.⁶⁷ The extended debate over the existence or unreality of these trust funds is outside the focus of this Article, but clearly the federal budget has been "balanced" in recent years through the use of payroll tax revenues to offset the deficit in general income and excise tax revenues.⁶⁸ Once the payroll tax ceases to be sufficient to pay for current outlays—depending on economic assumptions, that may begin to occur as early as 2015—these accumulated surpluses will have to be "drawn down" to pay for benefits.⁶⁹ In effect, in order to keep the overall federal budget balanced, income and other tax revenues will have to be used to pay off the bonds in which the trust fund surpluses are held and which will have to be liquidated to pay current benefits.⁷⁰

But these issues are clearly a question of political choices, not of demographics. The solutions to almost all of the problems potentially arising from an increasing elderly population, in fact, are political and philosophical since the demographics are simply phenomena with which our political and social systems must cope. The increase in payroll tax rates that may be necessary to sustain the current Social Security system past 2030, essentially until the baby boom generation passes from the scene, seems inherently distasteful to many critics, even apart from any ancillary economic effects such increased taxes might create. Yet, under the intermediate assumptions in the 2000 Trustees' Report, a tax increase today of slightly more than one percentage point on employers and employees alike would cover the system's shortfalls for the remainder of the seventy-five-year projection

⁶⁶ See *id.* at 22–27; see also AARON ET AL., *supra* note 7, at 11. See generally ALICIA H. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* (1982).

⁶⁷ See Barry Bosworth, *What Economic Role for the Trust Funds?*, in *SOCIAL SECURITY IN THE 21ST CENTURY* 156–177 (Eric R. Kingson & James H. Schultz eds., 1997).

⁶⁸ See Robert Ball, *Panel on Formulating a Deficit Reduction Package: What Is the Role of Social Security? First Presentation*, in *SOCIAL SECURITY AND THE BUDGET PROCEEDINGS OF THE FIRST CONFERENCE OF THE NATIONAL ACADEMY OF SOCIAL INSURANCE* 123, 127–128 (Henry J. Aaron ed., 1990) (discussing how surpluses in Social Security were used to reduce the federal deficit).

⁶⁹ See *TRUSTEES' REPORT*, *supra* note 41, at 25.

⁷⁰ See Bosworth, *supra* note 67, at 160.

period—a distasteful option, perhaps, but hardly cataclysmic.⁷¹ A perhaps more likely scenario would involve a combination of measures including raising the taxable wage base, using some general tax revenues, and increasing coverage, which together would reduce the size of any payroll tax increase necessary to cover shortfalls.⁷² The point is that the demographic picture in itself is not a prediction of doom.

A second point that complicates the demographic picture is the question of the overall dependency ratio—that is, the comparison of numbers of workers to *all* non-workers, not just the elderly.⁷³ The dependency ratio takes into account non-working children (generally those under eighteen) as well as non-working retirees in determining what percentage of the gross national product (GNP) must be shared with the non-producing sector of the population. The overall dependency ratio in 1960 was higher than it will be at any point in the seventy-five-year forecast period for Social Security; once again, the baby boom generation was the cause—this time in childhood rather than in old age.⁷⁴ While payroll tax rates in 1960 were relatively modest by current standards, the income tax rate structure was much more sharply progressive, with the highest marginal rates standing at 90%.⁷⁵ Although the total dependency ratio may rise again to the levels it reached in the 1960s, the total tax burden will probably look quite different if today's much higher payroll tax rates and much lower marginal income tax rates remain in place. Adjustments in the way Social Security benefits are financed may indeed be in order to reduce the effect of the regressive payroll tax. However, whatever ad-

⁷¹ See TRUSTEES' REPORT, *supra* note 41, at 24 tbl.I.G.2. Under the intermediate assumptions, the 75-year actuarial deficit is -1.89. Thus, an increase of .95%, from 6.2% to 7.15%, beginning in 2001, would eliminate the projected long-term deficit, taking into account trust fund surpluses that would be accumulated until around 2018. *See id.*

⁷² See Bosworth, *supra* note 67, at 175 ("The combination of a tax increase to restore actuarial balance and a mildly more aggressive investment policy could essentially eliminate future financing problems. While Social Security is a large share of the government budget as currently presented, it is a small element in the total economy.").

⁷³ Dependency ratios generally measure the number of persons in the society not engaged in producing output relative to those in the labor force who are—that is, the number of non-workers who must be economically supported by the working populations. See JAMES H. SCHULZ, *THE ECONOMICS OF AGING* 269 (6th ed. 1995).

⁷⁴ See Theodore Marmor et al., *Social Security Politics and the Conflict Between Generations: Are We Asking the Right Questions?*, in *SOCIAL SECURITY IN THE 21ST CENTURY*, *supra* note 67, at 195–207, 201.

⁷⁵ See HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF THE FEDERAL TAX SYSTEM, H.R. REP. NO. 103–17, at 64–65 (tbl.1 (1993)) (showing top marginal tax rate of 91 or 92% throughout the period 1950–63, dropping to 77% for 1964, and 70% for 1965–67. The top marginal rate did not fall as low as 50% until 1982).

justments might ultimately be made, the more general point is that demographics alone need not impel fiscal collapse, either public or private.

In addition, the conclusion that the demographics spell disaster for Social Security is based on the unstated assumption that retirement, like aging, is an inevitable stage of human life; hence, larger numbers of elderly necessarily means larger numbers of retirees drawing benefits from the program. Yet as lifespans increase, and the period of healthy capacity for work increases, it seems unreasonable to assume that most older Americans will continue to want to retire as young as the current retirement pattern of sixty-two to sixty-five, even if they have the financial resources to do so.⁷⁶ The age at which full Social Security benefits will be available is now increasing, in small annual increments, to age sixty-seven by the year 2022, and improvements in mortality and health in old age, as well as potential labor shortages, may further encourage older people to stay in the work force longer.⁷⁷

Finally, and probably most importantly, it is unclear exactly what a private account system in place of Social Security would do to solve the demographic issue. If the issue is presented as a question of too many retirees for too few workers, eliminating the burden-sharing system of social insurance and placing responsibility for retirement savings on each individual would change the distribution of the burden, but not its overall size. Privatization of Social Security cannot be presented as a solution to the issue of too many retirees; that problem can only be addressed directly by encouraging the baby boom generation to work longer, perhaps through elimination or severe reductions of benefits at age sixty-eight or seventy.⁷⁸ Why, then, do privatization advocates stress the problems posed for the Social Security system by the increasing numbers of elderly expected over the next fifty years?

While privatization cannot *directly* resolve the issue of too many retirees (and certainly its advocates do not use that as a selling point), a system of private accounts may indirectly discourage retirement by eliminating income security and redistribution. The uncertainty of having sufficient assets to insure lifelong income—an uncertainty that is inherent in an equity-based retirement system—is very likely to result in longer working lives, as was the case before the enactment of

⁷⁶ Harold Sheppard, *The United States: The Privatization of Exit, in TIME FOR RETIREMENT* 252, 259–260 (Martin Kohli et al. eds., 1991).

⁷⁷ *See id.* at 277–78.

⁷⁸ *See id.* at 278–79.

Social Security. Moreover, without even the modest redistribution of income provided through the Social Security benefit formula, the risk of insufficient retirement income will almost certainly be borne by low and average wage workers.

In summary, demography may not be destiny, but fertility and longevity patterns will clearly affect retirement patterns and how twenty-first century societies will support their elderly. Nonetheless, upon closer examination, the disasters privatization advocates fear seem to be less demographic and more political in nature. In both historic and economic terms, the working generation must *always* bear the burden of providing goods and services to satisfy the claims—expressed either as private savings or public entitlements—of the non-working, both the elderly and the young. Private account proposals, as well as less extreme proposals to invest part of the Social Security trust funds in stock market equities, in many ways hold out a false hope that the burdens of aging can somehow be paid for in advance and shifted away from the generation who will be working at the time the baby boom retires.

The only way to reduce the financial burden of supporting non-working members of society on each producing generation as a matter of demographics is to reduce the numbers of the non-working by either having fewer children (the baby boomers' solution) or delaying retirement (perhaps the baby boomers' fate). If neither of these steps is taken, then the issue becomes one of distribution of the burdens and the benefits across the working generation. A private account system would resolve the distributional issue in favor of the highly paid and at the expense of the low wage worker who currently benefits from the redistributive Social Security benefit formula.⁷⁹

2. Rate of Return

For many critics, the most intractable problem inherent in the design of Social Security, and the one for which establishment of private accounts is generally offered as a direct solution, is the "rate of return" issue.⁸⁰ Social Security's benefit and financing structure has

⁷⁹ See Steuerle & Bakija, *supra* note 14, at 1770 (discussing how under the current system low to moderate income people will be better off and high income individuals will be worse off); see also AARON ET AL., *supra* note 7, at 117–18 (switching to privatization would eliminate the possibility of paying extra benefits to workers whose earnings were low and would increase welfare applications).

⁸⁰ See, e.g., Nickles, *supra* note 34, at 96 (arguing that historical data and projections for the future show Social Security has a much lower rate of return than private markets).

frequently been compared to that of a defined benefit employer pension with required employee contributions.⁸¹ The usual way of describing this structure is as follows: each worker in employment covered by Social Security and her employer pay each year, in equal shares, a fixed percentage of the first \$72,000 or so of her wages—6.2% each, or a total of 12.4%—*in exchange for* the payment of a lifetime annuity to the worker beginning at age 65 (later for those retiring in 2000 and beyond).⁸² While the Social Security program also provides for spousal and survivor benefits in the event of the worker's death and for disability insurance coverage until the worker reaches retirement age, most workers, as well as the commentators criticizing the system's rate of return, generally assess the system's value to them as a retirement system.⁸³

Social Security is funded by a dedicated payroll tax, and the government is required under the Social Security Act to publish an assessment each year of the system's short, medium and long-term financial status, as a comparison of projected payroll tax revenues against program outlays.⁸⁴ As a result, the program is now embedded in public consciousness and in the thinking of policy analysts as a self-contained fiscal entity for which separate funding and expenditure comparisons are appropriately made each year. These annual assessments have consistently shown long term shortfalls in revenues based on the current tax rates and conservative to moderate economic assumptions.⁸⁵ It is these assessments, combined with the short-term financing problems of the late 1970s and early 1980s, that provided much of the impetus for calls for private alternatives to Social Security. These arguments for Social Security privatization usually compare

⁸¹ The original description of the Social Security program in the Report of the Committee on Economic Security in 1935 reflects this thinking: "A contributory annuity system, ... will enable younger workers, ... to build up gradually their rights to annuities in their old age." *Report to the President of the Committee on Economic Security, in THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935*, at 45 (1935) [hereinafter CES REPORT].

⁸² This is only the OASDI rate, financing the Old Age and Survivors' Insurance (OASI) and Disability Insurance (DI) programs. The remaining 1.45% of the FICA tax is for the Health Insurance (HI) or Medicare program. The Federal Insurance Contributions Act requires that employers and employees each "contribute" 6.2% of wages, up to a maximum taxable wage base, indexed for inflation to finance old-age survivor and disability benefits. 26 U.S.C. §§ 3101-3102 (1999). The taxable wage base was equal to \$76,200 in 2000. See TRUSTEES' REPORT, *supra* note 41, at 34-35 (listing the taxable wage base for each year from 1937 through 2000).

⁸³ See Sheppard, *News Analysis*, *supra* note 51, at 1012-13.

⁸⁴ 42 U.S.C. § 401 (1999).

⁸⁵ See Solomon & Barrow, *supra* note 7, at 15-16.

the wealth-creation potential of private accounts with a small or even negative "rate of return" under the public program.⁸⁶

For example, Senator Nickles bases the argument for private accounts on the opportunity for wealth building in the private system in contrast to the low return on investment offered by the public system:

Long-term savings should yield a retirement account larger than the actual amount invested adjusted for inflation, so as to reward saving. There are many investment opportunities that provide a reasonable rate of return. In engineering retirement security for America's future generation, lawmakers must make sure to give workers the opportunity to earn as much as they can on their investment.⁸⁷

Other commentators offer similar critiques of Social Security's low rate of return, contrasting it with returns offered by the stock market, admittedly at a higher risk.⁸⁸

There are a number of standard ripostes generally offered by supporters of social insurance in answer to the rate of return and adequacy-equity arguments. First, calculating the "rate of return" itself can be problematic, and there is no universally accepted method.⁸⁹ It is particularly difficult to take into account the certainty of receiving the annuity as a calculable factor. Of course, private accounts invested in stock mutual funds are subject to the risk of losing equity as a result

⁸⁶ See, e.g., Burke & McCouch, *supra* note 33, at 1167-73.

⁸⁷ Nickles, *supra* note 34, at 90. Senator Nickles goes on to contrast the savings possibilities with Social Security's poor investment possibilities:

The benefit of long-term savings and investment is compounded interest. Researchers have analyzed both historical data and projections for the future with results that are staggering in terms of the rate of return of Social Security versus private markets. . . . Social Security's real rates of return are diminishing rapidly. The average worker retiring in 1997 will recover the value of her own and her employer's contributions in 13.9 years; however, it will take almost twice as long for the average worker retiring in 2025 to recover those contributions—26.2 years.

Id. at 96-97.

⁸⁸ Solomon and Barrow summarize the issue this way: "Under either pay-as-you-go or partial advance financing, Social Security is unable to provide an adequate pension system. This is primarily due to the fact that without full financing, the system cannot exploit the tax-free compounding of interest on funds paid into the system." Solomon & Barrow, *supra* note 7, at 15.

⁸⁹ See Yung-Ping Chen & Stephen C. Goss, *Are Returns on Payroll Taxes Fair?*, in SOCIAL SECURITY IN THE 21ST CENTURY, *supra* note 67, at 76-89; see also John Geanakoplos et al., *Would a Privatized Social Security System Really Pay a Higher Rate of Return?*, in FRAMING THE SOCIAL SECURITY DEBATE, *supra* note 7, at 137.

of the vagaries of the stock market. But even private annuities purchased from an insurance company are not necessarily completely secure; insurance companies can always go bankrupt or otherwise become unable to honor their obligations under annuity policies. There is always a risk, therefore, that an annuity policy might not provide income until death. In contrast, social insurance payments underwritten by the taxation power of the federal government run no risk of being unfunded as a result of financial difficulties.

The rate of return calculation depends a great deal on the economic and cost assumptions used to set parameters such as the rate of inflation over the worker's lifetime, the value attached to cost of living increases in benefits after retirement, the value of survivors, disability, dependents benefits that might or might not be paid, and the steadiness of the worker's earnings history.⁹⁰ As a result, different analysts produce different estimates of the actual cost-benefit ratio.⁹¹ It is clear that current and future generations of workers will not receive the "bonanza" returns that the first two or three generations of retirees received, since the later generations will have been paying taxes into the system at higher rates over most of their working careers.⁹² Nonetheless, most workers should receive at least a small positive return when comparing their benefits to the taxes they paid.⁹³

Focusing on the calculation of returns, however, begs the more fundamental questions—why has the debate centered on the comparison between taxes paid and benefits received? And what assumptions about Social Security have produced this tax-benefit comparison in the first place? One reason, of course, is Franklin Roosevelt's insistence on tying worker contributions to benefits as a matter of political support for the new program.⁹⁴ History aside, the financing mechanism of the program also invites such a comparison. But even though benefits have always been financed primarily by payroll tax revenues, it does not follow that benefits need have any direct relationship to payroll taxes paid by individual workers, any more than the benefit of defense spending has any direct relationship to income taxes paid. It apparently seems intuitively correct to view the "value" of Social Security as a matter of comparison of "what you get" with "what you paid,"

⁹⁰ See Chen & Goss, *supra* note 89, at 76–89.

⁹¹ See *id.*

⁹² See *id.* at 83.

⁹³ See *id.* at 88.

⁹⁴ See *infra* notes 231–232 and accompanying text.

yet it is difficult to think of any other tax-supported program for which such comparisons are routinely made.

One probable reason the individual cost-benefit standard is applied to Social Security but not, for example, to national defense is that provision for retirement appears, on the surface, to be a function that can be undertaken through private means, without government involvement. As a result, as has been the case for many government functions that have been privatized over the past decade—prison operation or the postal service—the advantages of the private alternative are generally more of a focus than the internal problems of the government program being privatized.⁹⁵ In general, the case for a private account system rests on the notion that equity and property-based income rights are seen as the best—or the only—source of retirement income security.

The focus on comparing payments made to beneficiaries with the taxes they paid into the system, while intuitively appealing, nonetheless is misguided. There is no compelling reason why the financing mechanism should determine the perceived value of the benefits paid. Payroll taxes are merely a method of financing the system, not the basis for benefits earned and paid out.⁹⁶ Benefit calculations are made based on *earnings* recorded in the Social Security system, which is done as a record-keeping matter through withholding tax records filed with the Federal Reserve and forwarded to the Social Security Administration.⁹⁷ But benefit calculations do not take into account the amount of *taxes* paid; and benefits cannot be reduced in the event of a failure to pay such taxes by the employer who is responsible for withholding FICA taxes from workers' paychecks.⁹⁸ The system could as easily be financed through income tax revenues, like other government expenditures, without any impact on the earnings-based benefit structure.

Yet the tax-benefit comparison is routinely and unquestioningly raised as a disadvantage of Social Security, and proponents of Social Security expend almost as much effort in attempting to prove more

⁹⁵ See Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 132 (1998).

⁹⁶ The Social Security Act entitles all who meet the eligibility criteria to benefits based on earnings recorded through the payroll tax withholding system. See 42 U.S.C. §§ 402, 413–415 (1994).

⁹⁷ *Id.*

⁹⁸ I.R.C. §§ 3101–3328 (1994).

favorable rates of return as a counter-argument.⁹⁹ This analysis may be properly applied to a private annuity or insurance policy, but it is almost completely irrelevant to a direct transfer program under which the worker will receive benefits based on her earnings record regardless of the amount of taxes actually paid into the system. Nonetheless, the power of the idea of equity-based economic rights is such that both critics and supporters of Social Security have difficulty appraising the program's value without transforming taxes of general application into individual equity investments, and then mistakenly applying a straightforward investment/return ratio analysis to a benefit structure that is specifically designed to limit benefits for the highly-paid (thus depressing their "rate of return") and to provide disproportionately higher benefits for the low-paid.¹⁰⁰

This weighted benefit formula is itself a target for those criticizing Social Security as a bad "investment" for individual workers.¹⁰¹ The system is charged with economic inefficiency because it attempts to combine, in these critics' view, social welfare with economic equity functions and as a result fails at both.¹⁰² This view of Social Security as combining "adequacy" (just-above-poverty-level benefits for low-income elderly workers) with "equity" (benefits that increase as earnings increase, and that are paid regardless of income level in retirement) has long troubled conservative and liberal critics alike as an inefficient use of scarce public resources.¹⁰³

Both groups tend to view economic efficiency in the targeting of benefits as a paramount social policy goal that Social Security fails to achieve, as many workers with consistent lifetime earnings above the wage base, or with inherited or other unearned wealth, have more than adequate resources to support a comfortable retirement without any assistance from Social Security.¹⁰⁴ This perceived defect results in calls for means-testing Social Security, both from liberals and conser-

⁹⁹ See, e.g., Chen & Goss, *supra* note 89, at 76-89; see also THEODORE MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 163-64 (1992) (contending that charge that Social Security is a "Pouzi scheme" is mudslinging, and mischaracterizes public satisfaction with the system).

¹⁰⁰ See TRUSTEES' REPORT, *supra* note 41, at 68-69.

¹⁰¹ See, e.g., Nickles, *supra* note 34, at 90; Solomon & Barrow, *supra* note 7, at 15.

¹⁰² See Solomon & Barrow, *supra* note 7, at 14.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

vatives, as a way to insure that government benefits do not go to relatively wealthy retirees who do not need them.¹⁰⁵

Such calls for means-testing of course ignore the theory of Social Security as an earned entitlement that is quite different from charity or welfare.¹⁰⁶ This latter perspective is actually the view most Americans have traditionally held about Social Security, and it is a view encouraged by the perception of FICA taxes as the payment for their benefits similar to private annuity purchase.¹⁰⁷ The focus on equity and on the purchase of or investment in benefits as the source of future retirement income has probably helped to create broad public support for the program. The unfortunate result is that support for Social Security is based at least in part on a misapprehension about social insurance, one that also has given rise to the rate of return fallacy and debate. The fact that the most accurate description of the Social Security entitlement is "earned," not "paid for," has generally escaped public attention and is an oversight that has been encouraged by various political leaders. The question should be reexamined, however, as attention to earnings rather than contributions as the basis for entitlement rights produces a more lasting and sound approach to the retirement income issue.

The flip side of the public's support for their "annuities" is the perception that the public has been simply fooled into thinking they have an earned right entitlement and that social insurance benefits, like all other government payments, should be directed by policy planners and politicians to those groups who need them the most.¹⁰⁸ This policy analysis is the latter-day equivalent of prescriptions for outdoor poor relief that succeeded the English Poor Law. Poor relief,

¹⁰⁵ For a discussion of suggestions for means-testing, see Eric R. Kingson & James H. Schulz, *Should Social Security Be Means-Tested?*, in *SOCIAL SECURITY IN THE 21ST CENTURY*, *supra* note 67, at 41-61.

¹⁰⁶ See *infra* notes 270-278 and accompanying text for a discussion on public acceptance of earnings-based benefits as opposed to needs-based benefits. This attitude also reflects the social welfare policy analyst's reluctance to accept needs-based welfare benefits as the stigmatized, lesser-status benefits as compared to Social Security benefits, which have always had middle-class acceptance with little or no stigma because of the earned right on which they are based.

¹⁰⁷ See Virginia P. Reno & Robert B. Friedland, *Strong Support but Low Confidence: What Explains the Contradiction?*, in *SOCIAL SECURITY IN THE 21ST CENTURY*, *supra* note 67, at 178-94.

¹⁰⁸ See, e.g., Mickey Kaus, *The Case for Means-Testing Social Security*, in *SOCIAL WELFARE POLICY AT THE CROSSROADS: RETHINKING THE ROLES OF SOCIAL INSURANCE, TAX EXPENDITURES, MANDATES, AND MEANS TESTING* 117-24 (Robert B. Friedland et al. eds., 1999) (proposing transformation of Social Security into an Australian-style means-tested pension eliminating benefits for those with high income or assets).

both in Europe and in the United States, has formed the core of the Western approach to poverty which is based on a hierarchical view of wealth, poverty and moral worth.¹⁰⁹ Poor relief, like the charity of Aesop's ant, allows the well-off to determine who among the poor is worthy of support and acknowledges no right or entitlement belonging to the poor based on any factor—citizenship, past work effort, etc.—other than need. The Social Security entitlement, based on a lifetime of work, is fundamentally the antithesis of the poor relief model.

In summary, the argument that Social Security does not provide a high enough rate of return on the tax "investment" of individual workers relies on the notion that payroll taxes are equivalent to equity investments. Thus, the success of the argument depends on recharacterizing Social Security as a type of private annuity, something the program does not much resemble, and then criticizing it for failing to provide "investment returns" that were never a goal of the program in the first place. Whatever the actual merits of the rate of return argument, what is most interesting is its assumption that an equity interest is necessary to insure future income in old age. As will be discussed below, it is this core assumption that is most in doubt.

3. Social Security Costs Too Much

The third major criticism of social insurance as a mode of securing retirement income is focused on the overall cost of Social Security, both in terms of public finance (as a question of the cost of the program as a percentage of government resources or of GNP) and in terms of the future financial problems of the program (as benefits begin to outstrip payroll tax revenues).¹¹⁰ The popular version of this concern is "Will Social Security be there when I retire?" an almost theological approach to the public policy question of how best to provide for elderly Americans and continue to allow retirement in the absence of physical or mental incapacity for work.¹¹¹

There are several common elements in the various critiques relating to the fiscal burden of public retirement programs. First, critics repeatedly cite the dangers of "pay-as-you-go" financing, which results

¹⁰⁹ For a thorough discussion of the roots of American attitudes toward the poor as well as of current welfare policy, see generally JOEL HANDLER, *THE POVERTY OF WELFARE REFORM* (1995).

¹¹⁰ TRUSTEES' REPORT, *supra* note 41, at 19–31.

¹¹¹ See Solomon & Barrow, *supra* note 7, at 13 n.78 ("Today more young Americans believe in UFOs than believe they will receive their Social Security benefits.").

in benefit obligations being incurred without being funded in advance, as would be required for a private pension program.¹¹² A variety of ills arise from this financing structure according to these critics, including: the unfunded liabilities of future retirement benefits; recurring financial crises as revenues are outstripped by benefit payments; and a false sense of security foisted on the public when surpluses are run since those payroll tax surpluses are merely covering income tax deficits.¹¹³

Policy analysts frequently approach this issue by comparing the financing of Social Security with the financing required under federal law and accounting standards for private pension plans, raising the specter of "unfunded liabilities" of the system and charging the current structure with financial instability.¹¹⁴ In a similar vein, critics frequently characterize the continued expansion of the Social Security program, without corresponding tax increases sufficient to fund those expansions in advance, as evidence of "fiscal instability."¹¹⁵ For these critics, the only answer to this instability would be full advance funding of retirement benefits, on either a public or an individual basis.¹¹⁶

Second, many privatization advocates blame Social Security's perceived financial problems on what they see as unwarranted legislative expansion of Social Security from what was (again in their view) a limited anti-poverty program for the elderly at its inception in the 1930s.¹¹⁷ Many of the "cost" critiques reveal, in both their rhetoric and substance, an acute discomfort with the major role of government in determining individual retirement income planning that has resulted from the breadth and extent of Social Security benefits and coverage.¹¹⁸

¹¹² See *id.* at 14.

¹¹³ See Ball, *supra* note 68, at 127-28.

¹¹⁴ Solomon and Barrow note that:

Social Security . . . enjoys the dubious honor of being the largest single item in the federal budget and the largest government program in American history. Social Security outlays currently represent more than one-fourth of non-defense expenditures, and future obligations are projected to quickly consume assets, bankrupting the system, under the Social Security Board's intermediate assumptions, by 2030.

Solomon & Barrow, *supra* note 7, at 13 (citations omitted).

¹¹⁵ See *id.* at 14 ("The stability of pay-as-you-go financing depends upon the business cycle, fertility rates, inflation, and demographics.").

¹¹⁶ See *id.*

¹¹⁷ See Nickles, *supra* note 34, at 81.

¹¹⁸ *Id.*

These criticisms are based on a consistent philosophical view that the appropriate role of government in the economic affairs of individuals is a very limited one, resulting in minimal interference with the operation of the market economy. However, concerns about the over-expansion of Social Security and its intrusiveness in regulating private economic matters, while of major importance to policy makers, are not based on essential structural problems of the retirement system, but rather, are political critiques arising from political and philosophical differences of opinion about the role of government generally. Thus, there can be no "right" answer to the charge of "too big" a program, but only opinion informed by underlying political philosophies about the federal government's responsibility, its intrusion into individual citizens' lives, and the like.

The specific application of this vision to Social Security, however, has a couple of interesting twists that are tied to these advocates' attachment to equity ownership and private property rights as the source of autonomy and individual freedom.¹¹⁹ In particular, criticisms of the expansion of Social Security to provide both higher levels and more types of benefits are rooted in opposition to a permanent earnings-based entitlement that is not subject to periodic re-evaluation of eligibility based on poverty.¹²⁰ Those who advocate privatizing Social Security appear to see entitlement programs as wresting control over who receives government largesse away from Congress and the political forces influencing legislation, thus diminishing the role of public needs-based welfare programs which traditionally have been far more controlling of the lives of recipients and far less generous in the amounts paid than social insurance programs have been.¹²¹

In addition, the critiques of pay-as-you-go financing and the predictions of financial crisis arising from Social Security's "unfunded liabilities" inevitably are accompanied by calls for advance funding of Social Security (and failing that, for a private system that in effect requires individuals to advance fund their own retirement).¹²² Advance

¹¹⁹ See *id.* at 98-99 (observing that personal retirement accounts would give individuals ownership and property rights over their retirement savings).

¹²⁰ See Solomon & Barrow, *supra* note 7, at 14; see also Sheppard *supra* note 51, at 1012.

¹²¹ See generally HANDLER, *supra* note 109; Solomon & Barrow, *supra* note 7.

¹²² See Solomon & Barrow, *supra* note 7, at 15-16 (discussing proposals to fix Social Security); see also Peter A. Diamond, *The Economics of Social Security Reform*, in FRAMING THE SOCIAL SECURITY DEBATE, *supra* note 7, at 60-61 ("A larger trust fund is a way of making Social Security more valuable for future generations at a cost of making it less valuable for

funding of Social Security seems to be the public equivalent of equity-based annuities in the private sector. In essence, these critics would require the public entitlement based on past earnings to be tied to a corresponding public capital account, a true equivalent to the private pension fund, from which all benefits, current and future, would be financed based on a private equity interest.¹²³ Once again, privatization arguments, and even moderate prefunding suggestions, that generally appear to be based on economic rationalism and numerical data seem, upon closer examination, to be based just as much on a philosophical devotion to the property right principle.

The overarching complaint that "Social Security costs too much" can be addressed on several different levels. First, in answer to the question of how large a percentage of the federal budget should be devoted to Social Security benefits, the correct percentage is for the most part a matter of political opinion. Those advocating an expansive federal government are not necessarily alarmed by as much as 25-30% of the budget being absorbed by Social Security expenditures, particularly in the post-Cold War era.¹²⁴ Indeed, it could be argued that devoting government spending to transfer payments which are either spent on goods and services purchased by beneficiaries or saved and invested, have more salutary economic effects than spending on military hardware or other government capital expenditures which may have fewer reverberating economic benefits. Thus, the increases in expenditures necessary to pay for the retirement of the baby boomers over the next 40 years may be problematic only if one thinks that the government should not be large to start with, or that there are better ways to spend those funds.

Second, concerns about the absolute level to which payroll taxes would have to rise to support future benefits are based on the assumption that all future benefits should be financed by the payroll tax. However, even the original design of Social Security did not entail sole reliance on the payroll tax as a financing mechanism,¹²⁵ and it is certainly possible that other sources of revenue within the purview of the federal tax power could be utilized to finance benefits in the fu-

current generation. . . . The greater the degree of funding, the more the concern will be reduced.").

¹²³ See Diamond, *supra* note 122, at 60-61.

¹²⁴ See Ball, *supra* note 68, at 128.

¹²⁵ See J. DOUGLAS BROWN, *ESSAYS ON SOCIAL SECURITY* 44-56 (1977). Brown was the chair of the 1937-1938 Advisory Council on Social Security which developed much of the 1939 Act.

ture. Moreover, even if the payroll tax does remain the exclusive financing source, there is no agreement among economists, actuaries, or other experts on how high the tax rate will eventually have to be to cover benefit outlays, or on what effect such increases may have on the national economy.¹²⁶ Assertions that as much as 25% of payroll (in contrast to the current 12.4%) will be required to cover OASDI benefit obligations in the future are no more authoritative than claims that the payroll tax will not have to rise at all, especially if the age of retirement continues to rise.¹²⁷ Of course, objections to theoretical payroll tax increases can also be raised against increases in income taxes that might be necessary should the financing mechanism change. The principle underlying this critique, then, is really the same opposition to income redistribution through the tax and benefit structure that has surfaced in connection with the other critiques of Social Security.

Third, critics of the expansion of Social Security to cover ancillary benefit categories and to increase benefits in step with the consumer price index ("CPI") appear to a great extent to be simply expressing their own opposition to an expansive federal government role in income maintenance. One problem with such criticism of the "expansion" of Social Security to its current scope and size is that it is based on faulty history.¹²⁸ Social Security was envisioned from the beginning as eventually leading to the abolition of needs-based poverty programs for all but the extremely unfortunate, on the assumption that all adult breadwinners would be part of the covered work force and thus would earn a retirement benefit by the time they reached old age.¹²⁹ The program was meant to prevent those who had always worked in the paid labor force (and their dependents) from having to

¹²⁶ See, e.g., LAWRENCE H. THOMPSON, ADMINISTERING INDIVIDUAL ACCOUNTS IN SOCIAL SECURITY: THE ROLE OF VALUES AND OBJECTIVES IN SHAPING OPTIONS 5 (1999) (discussing generally the desire to avoid any additional burden on employers). See also TRUSTEES' REPORT, *supra* note 41, at 22-30.

¹²⁷ TRUSTEES' REPORT, *supra* note 41, at 173; see also Solomon & Barrow, *supra* note 7, at 13.

¹²⁸ Nickles, *supra* note 34, at 98. The claim made by Nickles that Social Security was supposed to be self sustaining is not correct. It was known from the beginning that payroll tax financing would just be a beginning to the solution and it was not expected to last indefinitely. See *A Letter from the President's Committee on Economic Security, Accompanying the Foregoing Message, January 17, 1935*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 47 (Samuel I. Rosenman ed., 1938); see also *The White House Statement Summarizing Report from the President's Committee on Economic Security (Excerpts), January 17, 1935*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra*, at 49, 53.

¹²⁹ See BROWN, *supra* note 125, at 6, 26, 84-85.

demonstrate need in order to qualify for a benefit upon reaching old age.¹³⁰

The "unfunded liabilities" critique of pay-as-you-go financing seems on the surface to be based on objective, nonpolitical criteria of actuarial and insurance principles. Application of private annuity criteria to a public transfer program, however, is neither necessary nor appropriate. If Social Security is viewed as a claim on income that is not based on equity but on an earned right to income at the time it is needed to pay for consumption in old age, then pay-as-you-go financing can be seen as an integral element of the structure and a sensible means of providing funding at the time benefits must be paid out. In any event, the concept of "unfunded liabilities" is incongruous in the context of a publicly financed program supported by the government's power to tax; bankruptcy is an odd analogy to use in connection with a publicly financed program that cannot in fact go bankrupt in fiscal terms.

Finally, the "high cost" of financing the baby boom's retirement is generally seen as a problem only of the publicly financed retirement program. Private solutions such as mutual funds, insurance annuity policies, employer-provided pensions and the like are marketed vigorously as a source of wealth and opportunity for those with the ability to take advantage of them. On a demographic basis, however, the overall share of the nation's GNP devoted to providing necessary goods and services to retired baby boomers will increase to the same level whether the source of funding is public or private. The real issue raised by the demographic patterns of aging already in place for this century is how the resources available to purchase those goods and services will be distributed among the elderly at each income level. There is a substantial likelihood that a private account system would result in longer working lives for many older Americans, as the risk of arriving at retirement age with insufficient resources to support retirement will inevitably be higher for lower wage workers in such a system.

4. Depression of Savings Rate

Martin Feldstein has argued for the past thirty years that the existence of Social Security has a detrimental effect on the national savings rate and that the current pay-as-you-go financing structure both

¹³⁰ See *id.* at 71.

discourages individuals from saving for their own retirement and inhibits national accumulation of capital and economic growth.¹³¹ Solomon and Barrow further argue that in the absence of either private retirement accounts or a pre-funded public system "an intergenerational transfer occurs from the working young to the retired elderly."¹³²

There has been substantial controversy over Feldstein's original work both because of a technical flaw in Feldstein's calculations¹³³ as well as a lack of consensus over the general theory of the connection between Social Security and the national savings rate. Feldstein recalibrated his calculations and—based on time-series data attempting to connect "social security wealth" (a concept Feldstein defines as the actuarial present value of Social Security benefits for the current adult population when they reach age sixty-five minus the payroll taxes they will have paid by that age) to aggregate private savings and consumption—continues to claim that Social Security must depress the national savings rate.¹³⁴ Feldstein has been unstinting in advocating elimination of Social Security, a latter-day Cato the Elder declaring "Social Security delenda est."¹³⁵

In his later work, Feldstein has emphasized not just the effect of Social Security on individual savings but also the effects of an "unfunded" pay-as-you-go system on overall levels of capital accumulation as the cumulative effect of depressed individual savings reduces the aggregate capital supply.¹³⁶ He concludes that "existing social security

¹³¹ See Feldstein, *Social Security*, *supra* note 31.

¹³² Solomon & Barrow, *supra* note 7, at 16.

¹³³ SELIG D. LESNOY & D.R. LEIMER, SOCIAL SECURITY AND PRIVATE SAVING: NEW TIME SERIES EVIDENCE WITH ALTERNATIVE SPECIFICATIONS (Social Security Admin. Office of Research & Stat. Working Paper No. 22, 1981).

¹³⁴ Martin S. Feldstein, *Social Security and Private Saving: Reply*, 90 J. POL. ECON. 630, 630-42 (1982).

¹³⁵ Cato the Elder was noted for his unwavering hatred of the state of Carthage, and for his declaration each time he took the floor of the Roman Senate, "Carthago delenda est!"—"Carthage must be destroyed." For Feldstein's similarly unwavering opposition to Social Security, see Martin S. Feldstein, *Should Social Security Be Means-Tested?*, 95 J. POL. ECON. 468-84 (1987); Martin S. Feldstein, *Toward a Reform of Social Security*, 40 THE PUBLIC INTEREST (1975); and see generally MARTIN FELDSTEIN, WOULD PRIVATIZING SOCIAL SECURITY RAISE ECONOMIC WELFARE? (National Bureau of Econ. Research Working Paper 5281, 1995).

¹³⁶ Feldstein states that:

The social security payroll tax distorts the supply of labor and the form of compensation. . . . Unlike private pensions and individual retirement accounts, the social security system does not invest the money that it collects in stocks and bonds but pays those funds out as benefits in the same year that

wealth reduces overall private saving by nearly 60 percent," as it "causes each generation to reduce its savings substantially and thereby to incur a substantial loss of real investment income."¹³⁷

The technical accuracy of Feldstein's economic analysis aside, what is striking from the perspective of developing a theoretical basis for retirement *income* security is the importance to his argument of the property metaphor and the economic necessity of capital accumulation. Feldstein's economic analysis, as well as his political critique, relies on the assumption that individual well-being in old age is dependent on the level of wealth accumulation (public and private) prior to retirement. The concept of "social security wealth" itself seeks to express future access to continued consumption in retirement as the present value of the future income stream, transforming that continued access into a current dollar figure representing accumulated wealth. Thus, the entire debate, in Feldstein's terms, is about how to accumulate the highest pile of figurative grains of wheat with which to survive old age.

Despite Feldstein's "rehabilitation" of his original calculations concerning the link between Social Security and private savings, many economists dispute his conclusions about the relationship between personal savings and economic growth, as well as his underlying assumptions about the effect of Social Security on the savings rate. For example, Robert Barro argued in 1978 that the existence of Social Security has affected the transfer of accumulated wealth from the older to the younger generation in a way that offsets the possible dis-savings effects of Social Security.¹³⁸ A number of economists including Alicia Munnell and Henry Aaron and, more recently, a survey of the literature by the Congressional Budget Office have found no conclusive evidence that the drop in the U.S. savings rate is a result of the existence of Social Security rather than other economic and social factors.¹³⁹

they are collected. The rate of return that individuals earn on their mandatory social security contributions is therefore far less than they could earn in a private pension or in a funded social security program. . . .

FELDSTEIN, REFORM, *supra* note 7, at 5-6.

¹³⁷ *Id.* at 17-18.

¹³⁸ See generally ROBERT J. BARRO, THE IMPACT OF SOCIAL SECURITY ON PRIVATE SAVINGS—EVIDENCE FROM THE U.S. TIME SERIES (1978).

¹³⁹ See CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, ASSESSING THE DECLINE IN THE NATIONAL SAVINGS RATE 37 (1993); MUNNELL, *supra* note 66, at 77-88; HENRY AARON, ECONOMIC EFFECTS OF SOCIAL SECURITY 51-52 (1982); see also Olivia S. Mitchell & Stephen P. Zeldes, *Social Security Privatization: A Structure for Analysis*, 86 AM.

Moreover, the connection between personal savings and national (or international) capital formation and economic growth and well-being is far from established.¹⁴⁰ Economist Arthur Okun argued in 1975—at the same time Feldstein did his original work on Social Security and savings—that there is little evidence that the level of savings in the United States is in any way insufficient to support economic growth and investment: “[T]he specter of depressed saving is not only empirically implausible but logically fake. . . . The nation can have the level of saving and investment it wants with more or less income redistribution, so long as it is willing to twist some other dials.”¹⁴¹ Indeed, given the substantial increase in stock market investments by pension plans, the current U.S. savings rate and its relationship to overall economic growth is difficult to estimate.¹⁴²

Clearly, then, there is no consensus among economists and actuaries in support of either the technical validity of Feldstein’s savings rate argument or the conclusions about economic growth he draws from his data. The continued reliance of privatization advocates such as Solomon and Barrow on the savings rate depression argument therefore reveals a great deal about the underlying philosophical and political assumptions of the privatization argument, which is built upon a vision of economic rights founded solely and exclusively on private property rights.¹⁴³

ECON. REV. 363, 366 (1996) (“Overall, it seems precarious to build a case for privatization based on the argument that it would increase national savings.”).

¹⁴⁰ According to economist James Schulz:

It is a common misconception that there is a direct relationship between the personal saving of individuals (for retirement and other reasons) and economic growth. While there is a need for saving to facilitate investment in the economy, there is a variety of ways such saving can be accumulated. Hence, there is no agreement on the need or importance of any one accumulation process, such as through personal saving or private pensions.

Schulz, *supra* note 73, at 112.

¹⁴¹ *Id.* at 113 (citation omitted).

¹⁴² See Kathy Bergen, *Personal Savings Stutter While the Economy Hums*, CTR. TRIB., June 5, 1998, at N1 (“Americans are actually doing pretty well” in their savings, according to Dallas Salisbury, president of the Employee Benefit Research Institute. The household savings rate is somewhat misleading, he said, noting, for example, that it “doesn’t include any values going up in the equity markets and it doesn’t include a lot of money in defined-benefit (traditional) pension plans, and that adds up to substantial amounts of individual wealth.”).

¹⁴³ See Solomon & Barrow, *supra* note 7, at 17; see also *infra* notes 147–173 and accompanying text.

In the absence of compelling evidence that private capital accumulation in the form of private savings is a necessary precondition for adequate economic growth, this critique of Social Security must be based on a philosophical and political preference for individually controlled savings and investment as what is viewed as the fulfillment of the ideological imperatives of the free market economic system. Indeed, even if Feldstein's analysis were correct—even if Social Security does depress the national savings rate—the argument against Social Security as a retirement income support system would remain essentially philosophical and ideological in character, since it is grounded in the equity accumulation model. The savings rate critique of Social Security is not about adequate retirement income but rather about increased capital accumulation and investment. Privatization advocates appear to assume that those two goals are synonymous—but that assumption can only be accepted if one assumes that economic rights in old age cannot be secured by any other means.

In summary, it appears that the real differences between publicly financed retirement programs and privately controlled investment funds preserved for retirement are the ancillary consequences of the status of the latter as private equity. Equity can be individually controlled, used as a source of capital accumulation for the economy generally, inherited by the next generation, and, perhaps most importantly, distributed among members of the working and non-working population through the mechanics of the market and the good or bad fortune of each individual. Social Security, on the other hand, as a public entitlement program, is controlled by the public as a whole through elected representatives, directly recycles tax revenues collected by the federal government out to beneficiaries for immediate spending, provides no opportunity for inheritance by heirs, and, most importantly, redistributes income according to public policy decisions. The major complaints about Social Security from those who would take the public's retirement rights private center on the ways in which Social Security is most unlike private equity. Yet it was private equity that failed to prevent widespread old age poverty in the face of economic depression in the 1930s—a failure that led to the establishment of the program in the first place.¹⁴⁴

¹⁴⁴ See *infra* notes 210–220 and accompanying text.

B. *The Case For Privatization—"To Get Rich is Glorious"*

Proposals to substitute private savings plans for the public entitlement did not begin to gain much popular attention or support until the early 1980s, during the well-publicized series of financing crises and subsequent congressional actions on Social Security.¹⁴⁵ However, it was not until the long bull market that began in roughly 1982 was well established, in the midst of the longest peacetime economic expansion in American history,¹⁴⁶ that calls for privatization reached beyond the confines of policy salons and congressional hearing rooms.¹⁴⁷

Most advocates for a system of private accounts focus on the opportunities for individuals to increase their prospective retirement income through private investment, in contrast to the limited return on the taxes they pay to support the Social Security system.¹⁴⁸ This "opportunity cost" analysis, which compares taxes paid in to benefits paid out, is based on the faulty "rate of return" analysis discussed previously.¹⁴⁹ But the campaign for private accounts reveals more, in both the substance and the rhetoric of the arguments used, about the roots of opposition to socialized responsibility for income maintenance based on entitlement rather than on individual determinations of need.

Both those who support Social Security and those who would take it private seek to promote individual autonomy. For supporters, Social Security's status as an earned entitlement gives beneficiaries autonomy *in old age* by guaranteeing a source of income that will prevent poverty upon retirement.¹⁵⁰ Advocates of privatization, on the

¹⁴⁵ See MARMOR ET AL., *supra* note 99, at 128-32 (discussing of Social Security financing "crisis" of early 1980's and public reaction).

¹⁴⁶ See, e.g., Louis Rukeyser, *Small Firms Look Like '87 Winners*, CHL. TRIB., Jan. 17, 1987, at C6 (stating the bull market began in August of 1982).

¹⁴⁷ While Feldstein can be said to have begun the chorus of calls for privatization of Social Security with his economics papers from the 1970s forward, the real flood of argument for privatization began with proponents like Ferrara in 1980 and continuing with Peterson's popularizing work in the late 1980s. The prolonged bull market began in about 1982, as discussed in ROBERT SHILLER, *IRRATIONAL EXUBERANCE* 5(2000).

¹⁴⁸ See *supra* notes 80-109 and accompanying text.

¹⁴⁹ See *supra* notes 80-109 and accompanying text.

¹⁵⁰ E.J. Dionne puts it this way:

Social insurance was a wise admission on the part of supporters of competitive economies that citizens would take the risk such economies require only if they were provided with a degree of security, especially against old age. . . . Risk is tolerable, even desirable, as long as every one of life's risks does not become an all or nothing game. . . . The power of the social insurance idea

other hand, with their faith in the dynamism of the free market, focus on individual autonomy *before* retirement, viewing individual investment accounts in terms of opportunity rather than risk and consigning those whose gambles fail to pay off to poverty and the care of public charity.¹⁵¹ In the words of the New China motto, "To get rich is glorious."¹⁵² An account system based on risking equity promises the chance of substantial wealth in old age, not merely the security provided by a right limited to a defined future income stream under Social Security.

The substantive arguments made by private account advocates and the rhetoric they employ embody a latter-day Protestant ethic that is at once optimistic and ruthless. The arguments can generally be grouped into three categories. First, supporters argue that an individual account system would provide a vastly improved rate of return from investment in equities, or even from straight interest compounding, for all or almost all participants.¹⁵³ The implicit—and occasionally explicit—promise is that retirement savings in such a system could provide an opportunity to live better in retirement than while working. Second, each individual would be able to take control of her own retirement planning and tailor savings and investment plans to individual needs and visions of retirement; in the new retirement system, everyone will be his or her own money manager.¹⁵⁴ Third, private accounts would reverse the downward trend in the national savings rate and provide a source of capital building for the economy as a whole, leading to increased economic growth and presumably more retirement resources for all.¹⁵⁵

Possibly the most important conclusion that can be drawn from looking at these arguments as a whole is that the private account system has a fundamentally different purpose, as well as a different ethos, from that of Social Security. All of the advantages claimed by the private account system over the public system derive from individ-

rests on a respect for individualism. It does not rest on a utopian and mistaken view of what radical individualism can accomplish.

E.J. Dionne Jr., *Social Security Brief No. 6, Why Social Insurance?* (visited Sept. 12, 2000) <<http://www.nasi.org/socsec/briefs/ssbr6.htm>>.

¹⁵¹ Burke & McCouch, *supra* note 33, at 1167-73.

¹⁵² See generally ORVILLE SCHELL, *TO GET RICH IS GLORIOUS, CHINA IN THE EIGHTIES* (1984).

¹⁵³ See, e.g., Republican Party, *Blueprint*, *supra* note 55.

¹⁵⁴ See *id.*

¹⁵⁵ Feldstein's work is largely devoted to this notion, as discussed *supra* notes 131-144 and accompanying text.

ual risk, trading the surety of at least moderate income that has underwritten the modern institution of retirement for the possibility of greater wealth in retirement (and in inheritance). Adequate retirement income is assumed as a necessary byproduct of the superior capital accumulation of the private account system, and the risk of not having sufficient equity to last until death is deemed worth taking for the sake of greater potential returns.¹⁵⁶

The case for privatization is subject to a variety of counterarguments which demonstrate that, once again, there is no conclusive economic or demographic argument which can in any sense "objectively" close the debate for one side or the other. Because the real arguments are political and philosophical, and because the goals of the two sides are similar, the real questions are much more difficult. Both privatizers and supporters of social welfare programs appear to believe in the importance of being entitled. The difference is how the entitlement is created—publicly or privately.

There are several points to be made in connection with private accounts before moving on to the problems with property-based entitlements from the perspective of social welfare advocates. First, the case for private accounts assumes that increased individual capital accumulation will lead to increased investment capital on a national basis and that the latter is necessary for increased economic growth. This is a rather simplistic view of the relationship between individual savings and capital accumulation necessary for national economic investment and growth. Moreover, little if any evidence is presented in any of the privatization literature indicating a national or global capital shortage which private accounts would be necessary to remedy. Second, the "property right" of the private account is presented as a principal advantage of privatization. Some advocates are quite explicit about the advantages of such a property right in terms of estate build-

¹⁵⁶ Solomon and Barrow argue that:

Social Security must be liberated from its inherently contradictory welfare and insurance roles and its fundamentally unstable financing scheme. The current system must be replaced with a program that grants workers a stake in their retirement, eliminates the negative impact on personal savings, and allows retirees to enjoy the benefits they have earned. Privatization is necessary to achieve these goals, to break the political quagmire, and to provide for the futures of tomorrow's retirees. Privatized pensions offer superior returns, carry protected property rights, and are beyond the reach of politicians.

Solomon & Barrow, *supra* note 7, at 17.

ing.¹⁵⁷ While advocates focus on the inheritance advantages of private accounts for low-wage workers, presumably these advantages would be even greater for higher-wage workers who would be less likely than low-wage workers to exhaust accumulated accounts in retirement.

Yet a system of private accounts was essentially in place as what passed for a national retirement system before the enactment of Social Security.¹⁵⁸ While most women were not in the paid work force, and most men worked long past age 65, those who did retire had to rely on private resources, at least once the generation entitled to Civil War veterans' benefits had died out.¹⁵⁹ One question to ask, therefore, is whether conditions today are, or the proposed private account system itself is, so different from the purely private voluntary savings and rudimentary pension plans that failed the vast majority of working Americans so profoundly during the 1930s.

Unless one disagrees with Alan Greenspan's assessment that the cyclical nature of capitalism has not been repealed,¹⁶⁰ the same risks of loss and failure of private equity that overwhelmed private resources during the Great Depression will continue to apply to a private account system. Moreover, while the stock market in the aggregate provides positive long-term growth under most scenarios, the *real* rate of return (that is, increase in stock prices minus increase in consumer prices) is not as easy to predict. In addition, while the stock market can affect the distribution of wealth between winners and losers, it does not, over the long run, itself create real economic wealth. In general the market can be expected to keep pace with national economic growth, just as indexed Social Security benefits do, as they keep pace with wage increases before retirement and price increases after retirement, protecting the workers' relative income position at

¹⁵⁷ Senator Nickles states:

A system of personal savings accounts [means that workers] who start work earlier are rewarded by a system that depends on compounded investment and returns. Furthermore, because benefits would no longer be tied to life expectancy, retirement money would belong to the workers, whether they lived five years past retirement or twenty. Consequently, low-wage earners could pass along their remaining benefits to children or grandchildren, thereby increasing future generations' opportunity for a higher standard of living.

Id.

¹⁵⁸ See *infra* notes 212-220 and accompanying text.

¹⁵⁹ See *infra* notes 212-220 and accompanying text.

¹⁶⁰ Alan Greenspan, Testimony before the Senate Budget Committee, Federal News Service, Jan. 26, 1995.

retirement and their consuming power during retirement. Thus, while a system of private accounts is likely to produce some differences in the distribution of wealth between winners and losers, there is no reason to expect a higher level of income for *everyone* when compared with payments under Social Security.

The point is reinforced when two more technical issues raised by the prospect of privatization are considered: the cost of a transition from the current system to a privatized system and the ongoing administrative costs of a personal account system. The transition to a private account system involves moving from a pay-as-you-go system in which current taxes pay current benefits to an advance funded system in which each individual is responsible for saving enough to finance her own retirement. The problem is that current benefits would still have to be paid; the working generation, at whatever point privatization were to be enacted, would be required to pay for the current benefits of the retired generation while also advance funding its own retirement.

While privatization plans recognize the problem of transition costs and devise various creative ways to spread the burden of double paying for one generation,¹⁶¹ the only real solution is to use general tax revenue, rather than payroll tax revenue, to finance the transition. There is, however, no way to escape the fact that during the transition to a private system the working generation would bear the responsibility for paying for two generations' retirement claims, whichever tax system might provide the funds.¹⁶² It is remarkable that while privatization advocates believe the baby boomers' children will not be willing to bear the burden of their parents' Social Security benefits, they nonetheless assume that the boomers or their children will be willing to pay for *two* generations' worth of retirement benefits in a transition to a private plan.¹⁶³

¹⁶¹ See Solomon & Barrow, *supra* note 7, at 18.

¹⁶² See Moore, *supra* note 95, at 157-158 (discussing how different proposals can result in transition costs ranging from 1.6% additional payroll tax up to about 5%).

¹⁶³ A recent monograph published by the United Nations examines the transitional costs involved in shifting from unfunded to funded pension systems in Latin America, essentially in the Chilean model, and concludes that "in several countries, especially those with more aged populations and high coverage systems, the pension debt is very high, and that a switch from unfunded to fully funded systems implies substantial fiscal costs, that may even turn out to be economically and politically unviable. . . ." JORGE BRAVO & ANDRAS UTHOFF, TRANSITIONAL FISCAL COSTS AND DEMOGRAPHIC FACTORS IN SHIFTING FROM UNFUNDED TO FUNDED PENSION IN LATIN AMERICA 5, U.N. Doc. LC/L 1264-P (1999).

The other specific cost hurdle, and one that casts considerable doubt on the "rate of return" argument made by privatization advocates, is the seemingly trivial issue of the administrative costs of maintaining and investing private accounts. Whatever the shortcomings of a large government bureaucracy, the costs of administering the Social Security system are extremely low—about one-half of one percent of the total outlay in benefits each year. This figure covers salaries of Social Security Administration employees, maintenance of hundreds of district offices all over the country, computers, and so on.¹⁶⁴ Administrative costs are so low because Social Security is a relatively easy program to run—its status as an entitlement based on past earnings means few face-to-face meetings or judgments are required, and most, if not all, beneficiaries never have occasion to meet with a Social Security Administration staff person.¹⁶⁵

In contrast, the administrative costs of personal accounts could amount to as much as 10–25% of the amounts deposited,¹⁶⁶ primarily in fees paid to investment advisors, stock brokers, and various types of investment and transaction fees. The experiences of the Chilean and other government pension programs that have gone private confirm that the fees required to operate private accounts greatly reduce the return on individual investments.¹⁶⁷

Finally, the involvement and responsibility of individuals in managing their own retirement in an individual account system frequently is presented as a signal advantage in itself.¹⁶⁸ The implication of these

¹⁶⁴ See TRUSTEES' REPORT, *supra* note 41, at 6 tbl.I.C1 (summary of OASDI Trust Fund Operations).

¹⁶⁵ This is one contrast that is frequently overlooked by those who call for means-testing the program. The prospect of checking income and assets of 35 or 40 million beneficiaries, each month, should give pause to those who would like to increase the "targeting" efficiency of the program through means-testing.

¹⁶⁶ See THOMPSON, *supra* note 126, at 6. Under a centralized federal model the additional annual costs are less than 0.1% of the assets under management. Costs are substantially higher where the activities are decentralized. In the United Kingdom, charges averaged around 10%, and in Chile the charge ran about 19% of contributions. See *id.*

¹⁶⁷ See BRAVO & UTHOFF, *supra* note 163, at 8 (administrative costs of the Chilean system by 1999 were close to 25%).

¹⁶⁸ According to Senator Nickles:

Today, Americans are increasingly aware of the need for long-term financial planning and are capable of handling their own investments. Indeed, surveys show that Americans are already investing in the private market and becoming better educated about how it works. . . . Moreover, they want to have ownership over their own futures.

encomiums to the widespread use of "capitalist tools," to paraphrase the Forbes Magazine motto, is that the more individual working Americans are involved in investing and working with stock portfolios, the better. It is unclear, however, that such involvement would in fact be a good thing, from either an economic or social perspective. Clearly, some individuals have a knack for working with financial instruments and investments, while others do not. More significantly, some have the inclination to be money managers whereas others do not. The increased focus of American life on investment returns and stock market performance is assumed by privatization advocates to be an unalloyed social good. Yet the social costs of this preoccupation with the mechanisms of investment and the drive for wealth accumulation, at the expense of other forms of social participation—volunteer activities, community affairs, politics—have not been taken into account.

The current popularity of day trading has led to many reports of lost family savings and homes, as the stock market is in effect used as a substitute for Las Vegas and Atlantic City casinos.¹⁶⁹ Moreover, as computer trading makes the stock market more volatile without any corresponding changes in company performance or prospects,¹⁷⁰ it becomes clear that individuals' involvement in managing their stock market portfolios is not an unmixed blessing.¹⁷¹ One prominent economist states:

¹⁶⁹ See, e.g., Deborah McGregor, *Levitt Warns Inquiry of Risks in Day Trading*, FIN. TIMES LONDON, Sept. 17, 1999, at 6; Tom Walker, *If You Love to Play the Market, Take this Test—You May Have a Problem*, ATLANTA J. CONST., Jan. 13, 1994, at F3.

¹⁷⁰ See David Barboza, *N.A.S.D. Chief Cautions Firms about Internet Trading Risks*, N.Y. TIMES, Feb. 10, 1999, at C9 (noting scrutiny being directed at day traders, and suggesting that "day traders are creating volatile and risky markets").

¹⁷¹ In fact, Shiller has characterized the last several years of increases in the stock market this way:

The recent high valuations in the stock market have come about for no good reasons. The market level does not, as so many imagine, represent the consensus judgment of experts who have carefully weighed the long-term evidence. The market is high because of the combined effect of indifferent thinking by millions of people, very few of whom feel the need to perform careful research on the long-term investment value of the aggregate stock market, and who are motivated substantially by their own emotions, random attentions, and perceptions of conventional wisdom. Their all-too-human behavior is heavily influenced by news media that are interested in attracting viewers or readers, with limited incentive to discipline their readers with the type of quantitative analysis that might give them a correct impression of the aggregate stock market level.

[It] would be a serious mistake to . . . [replace] the current Social Security system with a defined contribution plan for retirement, investing plan balances in the stock market, or even a plan that would give individuals a choice of investment categories. Such a plan would replace the current societal commitments to the elderly with a hope that financial markets will do as well as in the past. Adopting such a plan at a time when the market is at a record high relative to fundamentals would be a serious error of historic proportions.¹⁷²

I would add to this analysis the suggestion that the ideological significance of the wider involvement (indeed, close to obsession) of Americans in managing their retirement funds through a private account system may be as important to those supporting a private account system as the economic results. The promotion of private accounts and private property interests as the principal vehicle for retirement security, in opposition to a social insurance model, is not simply a campaign for increased autonomy in controlling funds that would otherwise be redistributed through the public tax and benefit system. The privatization campaign is a part of the ongoing "commodification" of the culture, in which all values and all activities are expressed as simply parts of or factors in the market economy.¹⁷³

By forcing all workers to become money managers and investment consultants, one major effect (if not purpose) of privatization would be to draw working people, who might otherwise view their stake in corporate well-being as rather remote, into thinking of themselves as capitalists whose fortunes are directly tied to the path of the stock market and the companies whose stock underwrites their hope of retirement. This identification of interests in terms of investment returns could tend to diminish any public focus on issues such as environmental destruction or child labor in developing nations or a host of other problems the solutions to which could affect the stock prices of the companies involved.

¹⁷² *Id.* at 222.

¹⁷³ See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 10 (1997) (arguing that commodification is an essential aspect of modernity); see also BARRY SCHWARTZ, *THE COSTS OF LIVING* (1992) (discussing the "marketization" of modern life).

II. THE PENUMBRA OF PROPERTY RIGHTS—AUTONOMY, PROPERTY AND RETIREMENT

The vision of retirement in which the private investment account proposals are generally grounded is that of a naturally occurring stage of life through which individuals must plan to support themselves, as through all other phases of life. In this vision, equality of opportunity and access to the market are all that is necessary to maximize aggregate and individual well-being supported by private property rights accumulated throughout life.¹⁷⁴ Private account advocates are thus understandably skeptical of government income entitlements that effectively interfere with the workings of the market and that are backed only by collective will in the form of government action rather than indisputable private ownership.¹⁷⁵

Surprisingly, however, supporters of the current Social Security system, as well as those who do not explicitly support social insurance but who do support income or equity redistribution in some form, appear almost as committed to property rights as the basis for individual income security as are supporters of private account systems.¹⁷⁶ As a result, Social Security's supporters have had a difficult time developing a theory of economic rights that reconciles the redistribution of income inherent in social welfare programs with the control and possession ideals at the heart of the general notion of private property rights.¹⁷⁷

This section will examine the difficulty of breaking the link between equity and income rights in social welfare programs from the perspective of the advocate of income redistribution, starting with a discussion of the theories of "rights" and "entitlements" in which the arguments for and against social insurance are grounded. The next section discusses some historical aspects of the development of Social Security, including its roots in nineteenth century veterans' benefits, the program's enactment in the 1930s in response to the Great De-

¹⁷⁴ In this regard, see Martha Nussbaum, *Human Rights Theory: Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 274 (1997), for a cogent discussion of the relationship between rights and welfare and the different types of equality, including well-being, resources, opportunity, or capabilities.

¹⁷⁵ See generally, e.g., Nickles, *supra* note 34.

¹⁷⁶ See *infra* notes 255–265 and accompanying text.

¹⁷⁷ See Robert W. Gordon, *Paradoxical Property*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 95, 95 (John Brewer & Susan Staves eds., 1996) ("The ideology of property as absolute dominion has many sources. . . . Yet . . . these very different sources. . . [tend] to converge. . . in the model form of property as absolute individual right").

pression, and its expansion up until the 1980s. The principal question is how the pension analogy, used to explain the program at its inception, was transformed from comparison to equivalence.

Next, I look at attempts, beginning in the 1970s and best represented by Charles Reich's theory of the "New Property," to give public income benefits a "rights" based legal status.¹⁷⁸ These efforts were principally designed to provide protection for recipients of welfare benefits by redefining them as a "new property" subject to constitutional due process rights, thus preventing loss of benefits without a hearing or appeal process.¹⁷⁹ This attempt to recast welfare into property is widely conceded to have failed, even by Reich himself.¹⁸⁰ It is nonetheless worth examining, to see that the common element in the approach of Reich and successive theorists of redistribution is the dominance of the property right leitmotif and the limitations that devotion to equity-based economic rights has imposed on their analyses.¹⁸¹

One driving force behind Reich's efforts seems to have been the phenomenon of public support for Social Security as contrasted with the lack of support for welfare benefits often decried by social welfare advocates and historians.¹⁸² I suggest that this distinction may reveal a cultural acceptance of an alternative theory of economic rights linked to the workmanship ideal that provides a more complete explanation for the source of public support for, as well as a substantive right to, Social Security, in contrast to need-based benefit programs.

A. A Question of Rights

The least explored aspect of the debate over the future of Social Security is the legal and theoretical basis for the claims presented in the public and private models. The claim represented by Social Security benefits is a statutory claim, created by past work effort of the in-

¹⁷⁸ See Reich, *New Property*, *supra* note 26, at 785.

¹⁷⁹ See *id.*

¹⁸⁰ See Charles Reich, *Symposium On The Trends In Legal Citations And Scholarship: Property Law And The New Economic Order: A Betrayal Of Middle Americans And The Poor*, 71 CHI.-KENT. L. REV. 817, 819 (1996) [hereinafter Reich, *Symposium*]. For one major critique of Reich's approach, see generally William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986).

¹⁸¹ See generally Reich, *New Property*, *supra* note 26.

¹⁸² See generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1930* (1994) [hereinafter GORDON, *PITIED BUT NOT ENTITLED*]; MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986).

dividual, on a portion of the future productivity of the work force at large and unmediated by any equity interest. The private savings model also constitutes a claim on future productivity, but only on that part of future productivity stemming from the equity or property interest that is owned by the individual. Both public and private claims inevitably must be satisfied out of economic production at the time they are cashed in; the critical difference between the two is how each claim is secured—by private property rights or by the public political process.

The debate over old age security is essentially a philosophical argument over autonomy and the nature of economic rights. It is an argument steeped in the rhetorical and symbolic value each side attaches to private property rights. Proponents of maintaining Social Security as it is currently configured have basic goals that are very similar to those of the privatization advocates—to promote autonomy and prevent demeaning dependence in old age.¹⁸³ Privatization advocates, however, generally assume that private claims on future income that are based on a property right (some form of equity that will produce a stream of income in retirement) are superior to the public claim represented by Social Security.¹⁸⁴ This public claim is dismissed by these analysts as at best “political” or artificial in some way, at worst a shell game, and in any event not anything remotely resembling a “right” on a par with individual property rights.¹⁸⁵

It is possible, however, that the public entitlement governed by the public political process may ultimately be a more secure right and a better way to insure income security in retirement than the private claim, even without regard to such normative issues as redistributive equity.¹⁸⁶ Over the past thirty years, legal theorists, most notably Charles Reich in his classic essay “The New Property,”¹⁸⁷ and later, from different perspectives, Akhil Amar,¹⁸⁸ and Bruce Ackerman and Anne Alstott,¹⁸⁹ have attempted to legitimize the “rights” status of redistributive benefits by either redefining public entitlements as a type of pri-

¹⁸³ See, e.g., Robert M. Ball & Thomas N. Bethell, *Bridging the Centuries: The Case for Traditional Social Security*, in *SOCIAL SECURITY IN THE 21ST CENTURY*, *supra* note 67, at 259, 261; see also Solomon & Barrow, *supra* note 7, at 9.

¹⁸⁴ See generally Solomon & Barrow, *supra* note 7.

¹⁸⁵ See *id.*

¹⁸⁶ See *infra* notes 270–283 and accompanying text.

¹⁸⁷ Reich, *New Property*, *supra* note 26.

¹⁸⁸ Akhil Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlement*, 13 HARV. J.L. & PUB. POL’Y 37 (1990).

¹⁸⁹ BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

vate property right, or securing their legal status by linking them to actual redistribution of property.¹⁹⁰

I suggest here that, in contrast to the line of thinking promoted by Reich, it is possible, and in fact necessary, to think about economic entitlement in retirement as something other than a property right. If citizenship brings with it the right to civic participation, can a lifetime of work in the market economy produce the right to an income stream in retirement based on past effort *without* an intervening property right from which that stream of income is derived?¹⁹¹ This proposition requires consideration of the basis of rights generally and economic rights in particular and also some examination of the significance of public expectations about what creates rights.¹⁹²

I argue that the public belief that a right, in the form of a Social Security benefit, has been created through work and payment of taxes is not simply a charmingly naïve fable. On the contrary, this public perception, which is supported by a broad based political will to maintain Social Security generally, and individual benefits in particular, in fact creates a real right whose existence is necessary to protect the public institution of retirement—an institution which was specifically created and whose growth was encouraged by business and government alike to meet economic needs.¹⁹³

This suggestion of course raises the question of whether such economic rights are protected, as are property rights, by a Constitutional right to due process. Reich attempted to settle this issue for welfare recipients by redefining welfare payments as property rights that would therefore be governed by constitutional due process requirements, most notably a hearing and review process before such rights could be lost.¹⁹⁴ In the retirement context, however, due process issues rarely arise once initial satisfaction of eligibility requirements is established.¹⁹⁵

¹⁹⁰ See *infra* notes 242–265 and accompanying text.

¹⁹¹ Some interesting current work on the nature of citizenship has centered on the notion of economic citizenship in the context of economic globalization. See generally Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

¹⁹² For an illuminating discussion of connections between public rights and social norms, see Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

¹⁹³ See *infra* notes 199–235 and accompanying text.

¹⁹⁴ Reich, *New Property*, *supra* note 26, at 778–86.

¹⁹⁵ An extensive review of Social Security cases in the federal courts reveals no cases after a 1950s case dealing with deportation of a member of the Communist Party, which involved depriving a primary recipient of benefits under Title II of the Social Security Act

It seems that due process concerns (and the resulting attempts to base all economic rights on property rights) apply almost solely where the rights in question are taken away.¹⁹⁶ Retirement income rights, in contrast, are *intended* to be permanent—as they must be if they are to fulfill their function in support of the retirement institution and are rarely if ever lost once the initial eligibility requirements are met. Due process is necessary for the orderly deprivation, not preservation, of rights; as a result, due process is not a relevant concern in the retirement income context.

The importance of permanent entitlement specifically in the context of retirement benefits, and as the basis of the retirement decision, is often overlooked but in fact can scarcely be overemphasized. The clear distinction between earnings-based entitlements (Social Security essentially) and poverty-based benefits (Aid to Families with Dependant Children prior to the recent welfare reform legislation, Social Security Insurance currently, and state welfare programs) that social welfare advocates have long deplored is the hallmark of a right to economic security in old age that is founded not on property but on a workmanship ideal of rights and entitlement.¹⁹⁷

The real significance of this distinction is that entitlement, based on statutory criteria, and essentially non-reviewable by bureaucratic authority, is inherently democratic, immunized from ad hoc decision-making, and respectful of individual autonomy and dignity. In contrast, public charity in the form of welfare payments made only to the needy through a hierarchical, top-down, evaluative process dependent on personal characteristics (income, assets, family status, drug or alcohol use, etc.) is inherently manipulative, degrading and undemocratic.¹⁹⁸ The history of Social Security in America supports the notion

once in benefit status, except for cases dealing with erroneous overpayments which, by statute, were allowed to be recouped. See, e.g., *Califano v. Yamasaki*, 442 U.S. 682 (1979).

¹⁹⁶ See *infra* notes 236–253 and accompanying text.

¹⁹⁷ William Simon's analysis of Reich's "new property" and social insurance well illustrates the liberal distaste for the distinction between poverty-based and earnings-based entitlements. See generally Simon, *supra* note 180.

¹⁹⁸ For a discussion of the concept of entitlement in the welfare context, and the impact of the Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104–193, 110 Stat. 2279, which eliminated the few entitlement protections that existed under the old AFDC program, leaving recipients completely vulnerable to state and local administrative actions, see Sylvia Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471, 483–88 (1997). For the classic indictment of welfare as a means of social control, see generally FRANCES FOX PIVEN & RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (2d ed. 1993).

that the work-based retirement entitlement was not simply an accidental result of the New Deal response to the Great Depression.

B. *Roots of Income Entitlement: Social Security and the Pension Analogy*

Lack of historical perspective frequently plagues policy debates, and nowhere has the absence of historical knowledge been more damaging than in the Social Security discussion.¹⁹⁹ It is not only instructive to examine the origins of the Social Security system and the institution of retirement in this context, it is essential in order to understand why income rights based on earnings may be more rooted in American tradition than is generally realized and why the property-based pension and annuity system proved so inadequate in the 1930s, prompting enactment of Social Security. Finally, some sense of the historical development of voluntary retirement is critical to understanding the institutional importance of the income entitlement. It is fair to say that retirement did not prompt the development of Social Security but rather the reverse—the enactment of Social Security made middle-class retirement possible.

1. Retirement and Entitlement in American History

The origins of the earnings-based entitlement concept substantially pre-date the economic crisis of the Great Depression, although retirement was not the original focus of such entitlements.²⁰⁰ Public income rights, in the form of government benefits for veterans and their families, and thus based on public service rather than on equity, were the immediate and widely experienced precedent for Social Security.²⁰¹ While government support for needy elderly was well-established both in Great Britain and in the American colonies as a form of "outdoor" poor relief (as opposed to incarceration in poor-houses) provided to elderly poor with local residence or family ties,

¹⁹⁹ Much of the historical discussion in both the Solomon and Barrow and the Nickles articles is inaccurate, particularly the notion that there was no substantial history of government support for the poor or for the elderly prior to enactment of Social Security. See, e.g., Solomon & Barrow, *supra* note 7, at 10 ("Before the adoption of the Social Security Act of 1935, the public sector played only a limited role and the federal government a virtually nonexistent one in combating poverty.")

²⁰⁰ I have explored the origins and evolution of Social Security and retirement entitlements in more detail in an earlier article, from which much of the discussion here is drawn. See Patricia E. Dilley, *The Evolution of Entitlement*, 30 Loy. L.A. L. Rev. 1063, 1085-39 (1997).

²⁰¹ See *id.*

regularized government pensions can be said to have originated in benefits awarded to needy veterans of the Revolutionary War in recognition of their service to the new republic.²⁰²

The scope of the Revolutionary War pensions was fairly limited, as initial entitlement was based not only on war service but also on demonstrated need.²⁰³ The much larger scale and carnage of the Civil War, however, resulted in a Union army veterans' pension program (with a counterpart for Confederate veterans eventually established by the former Confederate states) that developed by the early twentieth century into the first federal social welfare program, comparable in benefits and numbers of beneficiaries to the general social welfare programs then being established in Europe.²⁰⁴ Moreover, these benefits were paid not only to the veterans themselves but to their widows and orphans; thus, by 1910 about 18% of all Americans aged sixty-five and older were beneficiaries of the program, roughly comparable to the percentage of Europeans then receiving social welfare benefits under government pension programs.²⁰⁵ This was at a time when most men over age sixty-five continued in the paid labor force, and retirement was not yet an expectation of the majority of American workers.²⁰⁶

Members of the generation that reached its forties and fifties in the midst of the Great Depression were thus probably familiar with the concept of government-supplied benefits based on service, as they were likely to have had parents, other relations or acquaintances in the older generation who had received substantial income in old age from the federal government as an entitlement unrelated to need.²⁰⁷ Thus, the notion that the program sprang without precedent from

²⁰² See *id.* at 1095–96; see also Jolin P. Resch, *Federal Welfare for Revolutionary War Veterans*, 56 SOC. SERV. REV. 171, 172 (1982).

²⁰³ See Dilley, *supra* note 200, at 1095–96.

²⁰⁴ See THEODA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 102–151 (1992). Skocpol states that “[b]etween 1880 and 1910, the U.S. federal government devoted over a quarter of its expenditures to pensions distributed among the populace. . . . By 1910, about 28% of all American men aged 65 or more, more than half a million of them, received federal benefits averaging \$189 a year.” *Id.* at 65.

²⁰⁵ See *id.* at 132.

²⁰⁶ See Brian Gratton, *The Creation of Retirement: Families, Individuals, & the Social Security Movement*, in *SOCIETAL IMPACT ON AGING: HISTORICAL PERSPECTIVES* 63–68 (K. Warner Schaie & W. Andrew Achenbaum eds., 1993); see also Dilley, *supra* note 200, at 1102–1106 (discussing industrialization and beginnings of voluntary retirement).

²⁰⁷ If Civil War soldiers were 18 to 30 when they entered service in 1861, their children would have been born primarily between 1855 and 1890, so that when the Great Depression hit in 1929, those children would have been middle-aged to elderly adults themselves.

the minds of the New Deal brain trust, an aberration in the American tradition of self-reliance and rejection of government assistance,²⁰⁸ is simply wrong. The Social Security earnings-based entitlement in fact has substantial nineteenth century historical roots and is consistent with an American tradition of service-based, rather than poverty-based, government benefit programs.

2. The Failure of Private Property Rights

Of course, during the last half of the nineteenth century, at the time the Civil War pension system was being expanded to cover all veterans and their widows, most older Americans still worked on family farms—a setting in which formal retirement was not common even as the transition to industrialization and urbanization was beginning.²⁰⁹ All members of the farm family would typically work at whatever tasks they were capable of undertaking, from youngest to oldest, so that a gradual diminution of responsibilities would result eventually in *de facto* retirement.²¹⁰ Nonetheless, even in this setting, the older generation might seek to guarantee support from the younger generation through control of ownership and the conditioning of inheritance on maintenance of the elder until death.²¹¹

Industrialization, however, brought the need for employers to find a way to ease aging workers out of the factory or firm through the use of industrial pensions.²¹² Even though the majority of men over age sixty-five continued to work in paid employment until after World War II, company pensions began to be used more extensively as the pace of industrialization accelerated.²¹³ At the time of the stock market crash in 1929, however, only a small minority of American workers were covered by private pension plans and an even smaller

²⁰⁸ See, e.g., Solomon & Barrōw, *supra* note 7, at 10.

²⁰⁹ See generally HABER & GRATTON, *supra* note 16; DAVID HACKETT FISCHER, *GROWING OLD IN AMERICA* (1978).

²¹⁰ See W. ANDREW ACHENBAUM, *SOCIAL SECURITY: VISIONS AND REVISIONS* 105 (1986).

²¹¹ See *id.*

²¹² See James A. Wooten, *The 'Original Intent' Of The Federal Tax Treatment Of Private Pension Plans*, 85 TAX NOTES 1305, 1307-08 (1999).

²¹³ See DAN M. MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* 16-17 (3d ed. 1975); see also WILLIAM C. GREENOUGH & FRANCIS P. KING, *PENSION PLANS AND PUBLIC POLICY* 27-30 (1976). Most discussions of the extent of private pensions in this period draw on Murray Latimer's extensive contemporaneous survey of private pension plans, in which he estimated that about 400 industrial pension plans were established between 1875 and 1929 by companies employing less than 10% of the total labor force. Less than half of those employees would have ever qualified for benefits under those plans. See MURRAY W. LATIMER, *INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA* 42-48 (1932).

percentage could ever expect to draw benefits because of long vesting periods and eligibility terms that often required the worker to be employed by the firm at the time of retirement in order to receive benefits.²¹⁴ Moreover, most pension plans were not funded in advance, or were inadequately funded, as no legal funding requirement was imposed on employers until much later.²¹⁵

The minority of workers who did stop working in old age—most much later than sixty-five—were supported, once the Civil War veterans had died out, by private equity-based retirement plans: either informal (family farm income maintenance arrangements or personal savings) or formal (private annuities purchased with accumulated savings or, probably less commonly, employer provided pensions).²¹⁶ Elderly Americans dependent on these private arrangements were completely vulnerable to the collapse in equity values generally that followed in the wake of the 1929 crash and the ensuing world-wide economic depression.²¹⁷ As banks failed taking savings accounts with them and a downward price spiral ensued taking down all sorts of

²¹⁴ See ANN ORLOFF, *THE POLITICS OF PENSIONS: A COMPARATIVE ANALYSIS OF BRITAIN, CANADA AND THE UNITED STATES 1880–1940*, at 278–79 (1993).

²¹⁵ See GREENOUGH & KING, *supra* note 213, at 38. According to James Wooten:

In the second and third decades of the twentieth century, it became clear that the pay-as-you-go approach was no way to manage pension costs. In the 1910s, a number of public employers encountered cash shortages when the costs of their plans rapidly increased out of all proportion to expectations. The same problem hit many private firms in the 1920s. By 1915 this pattern of escalating costs produced financial difficulties and reorganizations of teacher pension plans in a number of cities and states. In the same year, the U.S. Steel pension plan amended its age and service requirements in the face of rising costs. . . . Another plan based on Carnegie's largesse, that of the Carnegie Foundation for the Advancement of Teaching, reorganized several years later for similar reasons. These events and others like the much publicized failure of the pension plan of Morris & Co. in the mid 1920s gave credence to the warnings of the first generation of American pension specialists that pensions would be secure only if employers funded these obligations in advance.

Wooten, *supra* note 212, at 1307–08.

²¹⁶ See JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE 78–79* (1988); see also Dilley, *supra* note 200, at 1115–19.

²¹⁷ "In terms of its impact on economic performance, the depression was a disaster without equal in the twentieth century. The contraction phase of the depression, extending from August 1929 to March 1933, saw the most severe decline in key economic aggregates in the annals of U.S. business cycle history. Real GNP fell by more than one-third, as did the price level. Industrial production declined by more than 50%. Unemployment rose to 25 percent by 1933." *Introduction to THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* (Michael D. Bordo et al. eds., 1998) [hereinafter *DEFINING MOMENT*].

property values, unemployment mounted and wages fell, depleting the ability of working age children to support their elderly relatives.²¹⁸

The impact on sources of retirement and old age income was stark: funded pension plans went bankrupt along with the banks their funds were held in; unfunded plans stopped paying benefits as employers closed their doors; and savings accounts disappeared.²¹⁹ Since most men over age sixty-five were still in the labor force, the high rates of unemployment probably affected them as much as the loss of pensions. Nonetheless, it is fair to say that the rudimentary pension arrangements in place at the time of the Depression, primarily based on private ownership equity principles, were overwhelmed by the drop in values that resulted from the economic downward spiral.

It is important to fully appreciate that there was no widespread retirement system or expectation in place prior to the enactment of Social Security. As a result, no precedent existed for mass retirement, in which almost all of the population over the retirement age stops working and is adequately supported by a fully private savings or pension system. Moreover, when the private pension system was revitalized in the 1930s in conjunction with the development of social insurance programs, including unemployment insurance as well as Social Security retirement and survivors insurance, it was a result as much of the efforts of industry to control labor force exits in an orderly fashion as of pressure from workers seeking more generous retirement income support.²²⁰

3. The New Deal and the "Property Right" Concept of Entitlement

The genesis of Social Security as the cornerstone of New Deal social welfare programs need not be described in great detail here.²²¹ However, a brief examination of the historical roots of the current program explains why the private pension metaphor was so consis-

²¹⁸ See COLIN GORDON, *NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920-1935*, at 160 (1994) [hereinafter GORDON, *NEW DEALS*]; see also HABER & GRATTON, *supra* note 16, at 42.

²¹⁹ See GORDON, *NEW DEALS*, *supra* note 218, at 160.

²²⁰ For an extended analysis of the cooperation between business interests and New Deal reformers in developing both Social Security and private pensions, see generally GORDON, *NEW DEALS*, *supra* note 218.

²²¹ Among the numerous accounts of the enactment of Social Security are the following: J. DOUGLAS BROWN, *supra* note 125; ORLOFF, *supra* note 214; QUADAGNO, *supra* note 216; and GRAEBNER, *supra* note 16. For a general recent history of the New Deal era, see generally DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999).

tently employed to describe both the benefits and the financing of a public social entitlement that differs significantly from the private model in critical respects. The New Deal policy designers who engineered the enactment of Social Security, especially President Roosevelt himself, apparently had as much difficulty envisioning an income right without a basis in property as more recent analysts have had. As a result, the financing mechanism of the program was tied so closely to the benefit entitlement structure that benefits were advertised as being paid for by the workers who were earning them and paying FICA taxes along with their employers. This perilous metaphor leads, as discussed above, to confused and misleading "money's worth" arguments about Social Security.

The first "original intent" issue is how the Social Security system both resembles and differs from the private pension design; the differences help to explain why the financing analogy is so faulty. When looked at together, the 1935 and 1939 Social Security Acts essentially put in place all the basic features of the Social Security retirement and survivors' insurance programs as they exist today: entitlement based on earnings reflecting a long term attachment to the paid work force; pay-as-you-go financing; and a benefit formula weighted in favor of low income workers.²²²

The entire point of combining entitlement based on earnings with redistributive benefits was to prevent working people from falling into poverty in old age, while avoiding targeting and means testing.²²³ It was assumed that all able-bodied workers (men, primarily, and women without small children) would be in the paid labor force (once the economy recovered) and thus would earn a right to benefits to insure against poverty caused by the specific anticipated eventuality of inability to work in old age, just as unemployment insurance was put in place for the eventuality of unemployment.²²⁴ Benefit payments were accelerated in 1939 to begin before any worker could have paid in FICA taxes any amount approximating the cost of a lifetime monthly annuity; this was a change which reflected, along with the redistributive benefit formula, the substantial anti-poverty purpose of the program.²²⁵ The immediate goal of fighting poverty

²²² See Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 MINN. L. REV. 379, 406, 408 (1983); see also BROWN, *supra* note 125, at 44-56.

²²³ See CES REPORT, *supra* note 81, at 45.

²²⁴ See Cohen, *supra* note 222, at 388, 407.

²²⁵ See Dilley, *supra* note 200, at 1123-24, 1128.

during the Depression, however, was intended to be achieved with the needs-based Old Age Assistance program, not Social Security, which was designed primarily with a view toward the future, not the present financial emergency.²²⁶

Far from assuming that most workers would not live long enough to retire and collect substantial benefits, the Committee on Economic Security, appointed by President Roosevelt to make the recommendations that led to the 1935 Social Security Act, based its report on data showing a life expectancy at age sixty-five of ten to fifteen more years.²²⁷ While retirement was not the expectation or the practice of the majority of American workers over sixty-five at the time, business interests in the United States and the rest of the industrialized world had already begun to appreciate the value of regular retirement as a labor force management tool.²²⁸ At a time of 50% unemployment, institutionalizing retirement through Social Security was one way to ease older workers out of the labor force in an orderly fashion, freeing up employment opportunities for younger workers.²²⁹ Although job creation was hardly the primary reason for establishment of Social Security, the program's role as an enduring institution providing retirement income to almost all American workers was an anticipated consequence of the basic design of the program.²³⁰

However, the features of the program most likely to make retirement possible for lower and middle wage workers—family benefits without reduction in the basic worker's benefit amount and redistribution in the benefit formula in favor of low-wage workers—are foreign to the purposes and design of private pensions, precisely because the concern for adequate benefits available to all workers is a public interest, not a private one. The risks against which social insurance protects should be viewed as broader than simple unemployment and poverty because of old age. The range of risks against which the social insurance entitlement guards include the risk of underemployment throughout a working life, periods out of the work force that lower total retirement savings, and inadequate education and training that lead to low lifetime wages—in short, the risks of poverty during life

²²⁶ See ORLOFF, *supra* note 214, at 290–92.

²²⁷ See CES REPORT, *supra* note 81, at 25 (“Men who reach 65 still have on the average 11 or 12 years of life before them; women 15 years”).

²²⁸ See GORDON, *NEW DEALS*, *supra* note 218, at 248.

²²⁹ See KENNEDY, *supra* note 221, at 257.

²³⁰ See CES REPORT, *supra* note 81, at 5 (“The satisfactory way of providing for the old age of those now young is a contributory system of old-age annuities”).

despite a substantial and regular work history that would make an adequate retirement income in the absence of a public entitlement unlikely if not impossible.

Yet the financing mechanism of the payroll tax was seen by President Roosevelt as the necessary equivalent of private pension financing—a product of his fiscal conservatism and revulsion against the repeated increases in the last public pension system (veterans benefits) brought about by insistent lobbying without any regard for fiscal restraint.²³¹ President Roosevelt remarked some years after the original acts were passed that he understood the regressive results of financing Social Security with payroll tax “contributions” but that there were strong reasons for using them rather than the income tax:

I guess you're right on the economics, but those taxes were never a problem of economics. They are politics all the way through. We put those payroll contributions there so as to give the contributors a legal, moral and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program.²³²

President Roosevelt's intention to create a property right rather than a civil right was part of an overall political strategy framed by a fundamental philosophy of fiscal restraint and aversion to poverty-based government aid.²³³ The functional result was the protection of a vulnerable social program with the veneer of the private pension; a right that has been paid for seemed less likely to be taken away than one granted by the grace of the body politic. This insistence on modeling the social insurance program as closely as possible on private insurance reveals, according to some commentators, an adherence to the principles of private law jurisprudence.²³⁴ From this perspective,

²³¹ See ORLOFF, *supra* note 214, at 290 (“Roosevelt and Witte, reacting to a policy inheritance which dramatized the dangers of politically motivated expansion of benefits, were determined to keep the federal government out of the business of giving direct grants to citizens and never wavered from a commitment to contributory features for whatever permanent old age program was settled on.”).

²³² FRANCES PERKINS, *THE ROOSEVELT I KNEW* 281 (1946).

²³³ See KENNEDY, *supra* note 221, at 266.

²³⁴ According to William Simon:

Perhaps the central substantive theme of liberal welfare discourse is the analogy of welfare benefits to traditional private law norms associated with contract and property. The private law analogy is in turn linked to an ideal of individual independence and self-sufficiency and to an ambition to immunize

the linkage between payroll tax financing and benefit payments was not only a politically astute cover, it was a logical necessity in the minds of President Roosevelt and those of his advisors who resisted the addition of any redistributive features to the social insurance program.²³⁵ The goals of autonomy in old age and insulation of the elderly from the manipulative and degrading requirements of needs-based programs seemed to be inevitably paired with the trappings of a private purchased contract right: the dedicated tax; a trust fund for the collection of revenues; and an accounting mechanism designed to mimic the private pension model to the greatest extent possible.

But the internal design of the program belies the appearance of a purchased annuity, not only because benefits are based on earnings rather than contributions, but more importantly because the overall benefit design satisfies socially determined goals of poverty prevention and induced exit from the labor force, not simply the individual need to insure income in old age. The most important distinction between Social Security and welfare programs derives from its distinctly different purpose and time-frame, not the lack of means-testing. Social Security was designed to meet socially determined needs with a future orientation, that is, to enable and encourage the working population to retire based on a permanent and guaranteed entitlement to lifetime benefits, a predicate for retirement itself. Welfare programs, on the other hand, are designed to meet immediate individual needs caused by poverty or unemployment resulting from politically acceptable causes such as motherhood in the pre-welfare reform AFDC program, needs that are assumed (and hoped) to be temporary.

Moreover, despite President Roosevelt's misgivings about incurring large "unfunded liabilities" by accelerating benefit payments before a pool of payroll tax revenue had built up, the public retirement entitlement cannot by its nature be advance funded. As discussed above, the Social Security trust fund books show surplus FICA tax revenues, but what do those surpluses really represent? Since consumption can only occur, and benefits can only be paid, in the present, current surpluses mean little in actual financial terms. The trust

distributive arrangements from collective reassessment and revision. On a practical level, it is linked to an aversion to direct or explicit redistribution, and especially to need-based or means-tested redistribution.

See Simon, *supra* note 180, at 1432.

²³⁵ See *id.*

funds actually signify the political will and commitment to pay benefits as they come due—the enforcement of a public right—whether through FICA tax or general income tax revenues.

The private plan, in contrast, must be funded with a genuine trust precisely because it is a private contractual obligation. The pensioner's claim on goods and services in retirement must be supported by benefits paid by the employer who has accumulated sufficient resources, in the form of a trust, to satisfy each participant's claim. Moreover, the size of the obligation is determined by individual contractual relationship, that is, the terms of the pension plan which set the benefit formula and other conditions in order to satisfy strictly personal and individual needs for retirement income that will support the desired (or allowed, for most employees) standard of living in retirement.

The public retirement entitlement is a public obligation designed to protect the public interest in social stability and orderly labor force exit by the elderly. The public entitlement is backed by the public taxing power and meets the public need for assurance of old age income security for all workers through redistribution of tax revenues. The notion of public advance "funding," and indeed the emphasis of the original designers of Social Security on payroll tax financing as the equivalent of private pension contributions, is an example of a useful analogy taking over the analysis and distorting the comparison beyond meaningful limits.

C. *The New Property—Reich and the Wrong Box*

The pervasiveness and persistence of the "property equals rights" paradigm is thus essentially common ground between those who would eliminate Social Security and the New Deal authors of the program. Moreover, the property metaphor has proved equally powerful and limiting for those advocating recognition of the concept of entitlement in provisions for the poor in the years following the New Deal.²³⁶ Thirty years after the New Deal designers of Social Security insisted on the property right equation as political security for the program, the social welfare law advocates of the 1960s and 1970s were faced with an uncomfortable (in their view) divide in the perception of social insurance entitlements based on earnings and means-tested welfare benefits. From their perspective, the earnings-based entitle-

²³⁶ See *infra* notes 255–266.

ment programs essentially preempted all poverty-based social welfare programs from achieving the same level of public acceptance and support.²³⁷

All of the federal programs, both means-tested and earnings-based, originated in the same legislative efforts during the New Deal, and while the system was viewed as a whole by many of the designers of what President Roosevelt himself characterized as a "cradle to grave" structure,²³⁸ the distinction between earnings-based and means-tested programs was clear in their minds.²³⁹ This distinction has been criticized by numerous analysts who see the differential in political and public acceptance of social insurance and welfare programs as an example of hostility to redistribution of income generally, and contempt for the poor in particular.²⁴⁰ Many recent analyses refuse to draw the distinction, referring to all federal benefits payments as "income transfers" or "welfare."²⁴¹

Despite the professional policymakers' resistance, the public and political leaders continued to support expansion of the social insur-

²³⁷ Historians have chronicled several factors contributing to the lack of public support and respect for welfare programs aimed at the poor. Clearly racism was one factor as the African-American migration to northern cities, which accelerated in pace in the post-war period, changed the public (if not the real) face of welfare clientele in the 1960s. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 194 (1992); see also JACQUELINE JONES, *THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT* 272-73 (1992).

²³⁸ PERKINS, *supra* note 232, at 283.

²³⁹ See Simon, *supra* note 180, at 1451 ("The dominant influence on the [Social Security] Act was Roosevelt, and the dominant influence on Roosevelt was a commitment to private law analogies and a concomitant distaste for public assistance. . . . Roosevelt consistently sought to minimize federal involvement in public assistance and to extirpate any resemblance to public assistance from the social insurance programs.").

²⁴⁰ Simon is particularly harsh in his assessment of the rights-based rhetoric of Social Security in contrast to the implicit unworthiness attributed to recipients of public assistance—"the dole," in Roosevelt's terms. See *id.* at 1449-53. For an extended discussion of the stigma attached to welfare but not to Social Security benefits, see generally GORDON, *PITIED NOT ENTITLED*, *supra* note 182.

²⁴¹ See e.g., Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1186 n.2 (1990). Baker states:

By "public assistance" I mean all government-provided "necessities of life," whether in the form of a cash grant or in-kind aid. Such benefits include food stamps, medical care, and cash grants to those unable for various reasons to earn a subsistence income. I mean, therefore, to include not only "welfare," but also non-need-based income maintenance insurance schemes such as Unemployment Compensation and Social Security, which provide cash grants to the unemployed, some of whom might have savings and other assets sufficient to provide them a subsistence income even in the absence of paid employment.

ance model throughout the post-war period and to hold fast to the stigma attached to means-tested benefits. In this setting, some advocates attempted to develop a theoretical basis for welfare benefits that would provide them with the status of legal rights beyond the earnings-based, private property metaphor that defined Social Security in the public mind. The most prominent of these efforts was Charles Reich's 1964 essay *The New Property*, which asserted a property status for welfare benefits in an attempt to provide a new protection against arbitrary removal of subsistence rights.²⁴²

Reich argued that because industrialization had stripped from individuals their "economic citizenship"—that is, the means to provide for themselves through land available for the taking as had been the prevailing model at the time of the Revolution and the writing of the Constitution—the political rights spelled out in the Constitution had become meaningless for a large segment of the population by the time of the Great Depression.²⁴³ The New Deal, according to Reich, was a bargained-for surrendering of power to the new regulatory state in exchange for economic protections for those whose access to economic citizenship had shriveled:

The New Property argued that, if the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as entitlements—a substitute for old forms of property.... Only if the new forms of wealth were protected by both substantive and procedural due process would the New Deal prove to be not merely a one-way transfer of power to the state, but a two-way bargain, with the people receiving a quid pro quo of economic rights in return.²⁴⁴

Thus, Reich's vision of securing the welfare entitlement was based on characterizing it as a form of property which would then be governed by due process rights—substantive and procedural.²⁴⁵ In the years following the publication of *The New Property*, as part of the same optimism about the possibilities of redefining and expanding constitutional protections to the poor, poverty lawyers and academics attempted to extend Reich's theory from the law reviews into public policy via the federal courts. They aimed to establish a constitutional

²⁴² See generally Reich, *New Property*, *supra* note 26.

²⁴³ See Reich, *Symposium*, *supra* note 180, at 818–19.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

right under the due process clause to a hearing before benefits could be terminated, as a logical consequence of treating welfare benefits as property.²⁴⁶ After a few initial victories, however, the effort largely failed.²⁴⁷

Completely separate from the battle waged in the courts to increase the level of procedural protections afforded welfare recipients, the whole structure of federal welfare came under sustained political attack. After two decades of criticism, much of it based in political calculation and racial and class stereotypes,²⁴⁸ political support for the concept of welfare was virtually nonexistent. Welfare reform, enacted late in the first Clinton administration, eliminated much of the federal role in setting the terms for benefit payments and transformed AFDC into a block grant to the states, setting up state legislatures and courts as the new poverty battleground.²⁴⁹ Sixty years after the New

²⁴⁶ For an extended description and critique of *The New Property's* due process legacy, see Simon, *supra* note 180, at 1459-78.

²⁴⁷ The principal victories were *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that statutory denial of welfare benefits to applicants residing in the state for less than a year creates an impermissible classification violating equal protection principles), and more prominently, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires a fair hearing prior to termination of welfare benefits which are based on statutory entitlement for qualified recipients). The watershed case reversing the trend since *Goldberg* was *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which the Court held that due process does not require an evidentiary hearing prior to the termination of disability benefits. See also Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 547 (1998). Edelman states:

Four facts frame the world as seen by advocates for the poor in 1999. One, the Constitution is not our friend. If thinking about the rights of the poor means thinking about any constitutional rights the poor have as a particular consequence of their poverty, the short answer is, they do not have any. The Supreme Court saw to that in a series of cases in the early 1970s. . . . Now we know that the Constitution provides no recourse for people who would invoke it to seek a judicial response to their need for income, health, housing, education, or any other element of survival.

Edelman, *supra*, at 547.

²⁴⁸ The Presidential campaigns of 1980 through 1992 all featured attacks on welfare "fraud and abuse," implications that the majority of welfare recipients were having children purposely to increase welfare payments, and the like.

²⁴⁹ See Edelman, *supra* note 247, at 550-51. Here Edelman states:

Although Congress is no longer interested in waging a war on poverty, Congress is far from irrelevant today, as there are still major opportunities to pursue and dangers to avoid in Congress. While Congress and the President cursed the poor with the Act of 1996, they enacted major child health insurance legislation in 1997. But more than at any time since the 1930s, legislative and other governmental action affecting the poor is also occurring in state capitals and locally. The 1996 federal welfare law devolved a vast array of deci-

Deal social welfare advocates battled to achieve federal administration and objective statutory criteria that would protect welfare recipients from arbitrary local government decisions, provision for the poor had come full circle.²⁵⁰

Even before Reich's articulation of the "New Property," the Supreme Court had rejected the notion that OASDI benefits, earnings-based or not, could be viewed as property in 1960 in *Flemming v. Nestor*.²⁵¹ In that case, the Court determined that Congress could amend the Social Security Act to deny Social Security benefits to a non-citizen who had been deported because he was a member of the Communist Party, based on a finding that such a change was not a taking of property protected by the Constitution.²⁵² William Simon has pointed out that *Flemming* is a rare case, in that Social Security benefits "were consistently regarded as rights by all three branches, were afforded elaborate procedural protections, and were more secure against substantive impairment than most forms of private law property."²⁵³ Nonetheless, the political protection afforded Social Security benefits by the Congress and the political process seemed inherently inferior to the constitutional due process rights with which Reich and his successors in poverty jurisprudence attempted to endow welfare benefits.²⁵⁴ It is clear, however, that the legal status of property has not been necessary to protect the benefits paid under the Social Security program. The concept of government welfare benefits as property trapped the development of welfare law in a conceptual box in which the right to a hearing was substituted for a substantive right to income maintenance. The lessons of welfare jurisprudence are instructive in demonstrating the limits of constitutional protections, in contrast to the seemingly unreliable protections of the political process.

D. *The Property Rights Fetish*

While the attempt to provide a federal constitutional grounding for welfare rights seemed to reach a dead end in the 1970s, with the coup de grace delivered in the 1996 welfare reform legislation, the

sions to the states; many states, in turn, left a wide range of decisions to the counties.

Id.

²⁵⁰ See generally GORDON, *PITIED NOT ENTITLED*, *supra* note 182.

²⁵¹ See 363 U.S. 603, 610–11 (1960).

²⁵² See *id.* at 605, 610–11.

²⁵³ Simon, *supra* note 180, at 1486 n.179.

²⁵⁴ See Reich, *New Property*, *supra* note 26, at 817.

search for a constitutional basis for redistribution of wealth generally continues in other guises. Two recent pieces of scholarship which attempt to develop a theoretical framework for redistribution of income to insure a more equal society reveal a continuing and apparently unshakeable conviction that economic rights must be based on property ownership.

The goal of Akhil Amar, in his provocative speech on property and the Constitution made to a Federalist Society meeting in the late 1980s,²⁵⁵ and co-authors Bruce Ackerman and Anne Alstott, in their 1999 book, *The Stakeholder Society*,²⁵⁶ seems to be to address the widening gap between rich and poor—between the powerful and the effectively (if not formally) disenfranchised. Amar is concerned with demonstrating the constitutional basis (indeed, imperative) for redistribution of property.²⁵⁷ Ackerman and Alstott simply propose a new public welfare expenditure financed by a new dedicated tax, a sort of mirror image of Social Security.²⁵⁸

²⁵⁵ See Amar, *supra* note 188.

²⁵⁶ See ACKERMAN & ALSTOTT, *supra* note 189.

²⁵⁷ Amar bases his notion of economic independence as a necessity for full citizenship on what he describes as the "R/republican tradition" in American law: "[A] minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share." Amar, *supra* note 188, at 37-38. Amar suggests the Civil War and the abolition of slavery in the Thirteenth Amendment had to provide a mechanism to achieve an alternate, inclusive economic democracy:

The solution to the problem . . . provides people with inalienable property rights in their own persons. Moreover, I suggest, it is a vision that, especially under section two of the Thirteenth Amendment, provides for forty acres and a mule. It is a vision that provides a right to sustenance and shelter: minimum sustenance, minimum shelter. . . . [T]he new economic rights under the Reconstruction Amendments are redistributive, at least in part.

Id. at 39-40.

Amar deliberately invoked the imagery of Jefferson as well as of Thaddeus Stevens to provoke thought about the fundamental connection between independent, autonomous citizenship and economic rights. In addition, he envisions his economic citizenship to include rights to adequate public education, and access to employment and job training. See *id.* at 42.

²⁵⁸ The principal ill Alstott and Ackerman seek to cure with their stakeholder proposal is the rising inequality of income in American society: "Trickle-down economics has utterly failed and will continue to fail in the globalizing economy of the future. The past is prologue: By 1995, the top 1% owned 38.5% of the nation's disposable wealth, up from 33.8% in 1983." Bruce Ackerman & Anne Alstott, *Isaac Marks Memorial Lecture: Your Stake In America*, 41 ARIZ. L. REV. 249, 250 (1999). Ackerman and Alstott propose a new starkly redistributive public entitlement based on the theory of an economic birthright:

In many ways President Roosevelt would have been quite comfortable with these theories of economic citizenship based as they are on the notion that the state has an appropriate and necessary role to play in giving individuals the tools of autonomy and self-support. On the other hand, redistribution of actual equity, implied by Amar's "stake in society" birthright for every citizen and Alstott and Ackerman's economic stake to be granted in young adulthood, seems to take the implicit redistribution accepted by Roosevelt as part of Social Security well beyond the realm of political reality, if not theoretical desirability.²⁵⁹

It is the perceived need for each individual to have a "stake in society" that ties these analysts' concepts of economic citizenship to property ownership. The "stakeholder" theories blend with nineteenth century agrarian imagery in relying on remarkably concrete notions of equity ownership as the necessary basis for full participation in democratic society.²⁶⁰ To be sure, both Amar's "forty acres" and Ackerman and Alstott's "stakeholder" notions of economic citizenship are consistent with support for public education and job training—both of which are long-standing public services regularly viewed by local governments as at least a basic obligation. If the idea of a "stake" were simply embodied in better public services, there would be little need to invoke the abolition of slavery, the Thirteenth Amendment and Thaddeus Stevens.²⁶¹ The really new suggestion, therefore, is direct redistribution of property: a tangible economic stake not simply permitted by the Constitution according to Amar but *required* by the Thirteenth Amendment's abolition of property in the form of slavery.²⁶²

I would suggest that any vision of economic justice based principally on equity ownership—however reliant that ownership might be

The basic proposal is straightforward. As young Americans rise to maturity, they should claim a stake of \$80,000 as part of their birthright as citizens. . . . Stakeholders are free. They may use their money for any purpose they see fit: to start a business or pay for higher education, to buy a house or raise a family or save for the future. But they must take responsibility for their choices. . . . We do not deny the need for a "social safety net" for Americans who make particularly bad choices, but this is not our primary focus. We are concerned with providing a fair opportunity for success for all Americans, and not only those lucky enough to be born to parents of the symbol-using classes.

Id. at 250, 251, 254.

²⁵⁹ See *supra* notes 257–258.

²⁶⁰ See *supra* notes 257–258.

²⁶¹ See *supra* note 257.

²⁶² See *supra* note 257.

on redistribution originally—is inescapably based on the assumption that the market will operate to advance the interests of autonomous individuals. The presumption is of a neutral market working to the benefit of autonomous individuals engaged on a more or less level playing field—made level by the redistribution of property—and leading to the maximum aggregate welfare for the largest number of players. This is the same implicit free market cosmology with which the arguments for privatization of Social Security are imbued, under which equity ownership controlled by individuals is a sufficient guarantee of income security in old age.

The problem with this equity-based vision of retirement security is once again essentially temporal: if retirement is voluntary, it must be based on an assurance of an income stream sufficient to take care of all needs, including unexpected needs that could emerge down the road (such as long-term care or catastrophic medical expenses). Equity, whether purchased, received in a redistributive entitlement program, or inherited, is only as valuable in the long run as—and can only be relied upon to the extent of—its exchange value at the time need arises. If the initial stake proves to have insufficient value at the time it is needed in old age retirement, when opportunities to acquire additional equity are likely to be greatly diminished or even non-existent, there would seem to be little difference from the perspective of old age between Amar's birthright entitlement under the Thirteenth Amendment and the free market economic system in place at the time of the Great Depression. In many ways, the notion of a birthright entitlement is the completion of President Roosevelt's vision of a society where retirement, unemployment and other entitlements based on earnings rather than need would replace "the dole," on the assumption that all Americans would have access to employment and the tools with which to build a good life.²⁶³

²⁶³ See ORLOFF, *supra* note 214, at 290. Orloff states:

A vivid example of [Roosevelt's distaste for welfare and commitment to earnings based entitlement] came when Harry Hopkins. . . eloquently argued for noncontributory old age and unemployment benefits as a matter of right for citizens. FDR saw this as being 'the very thing he had been saying he was against for years—the dole' and vetoed all such proposals. . . Roosevelt, Perkin, and Witte preferred to develop what they saw as the only reasonable and fiscally sound long-term solution to the problem of old age dependency: a contributory program of old-age benefits, to be firmly distinguished from noncontributory social assistance.

Regrettably, however, capitalist market economies undergo periodic, and occasionally catastrophic, crashes in overall economic values.²⁶⁴ The point of retirement entitlements is to encourage both work throughout life, and cessation of work in old age with the promise of a secure income stream to prevent dependence and degradation of living standards after work has stopped, even in the event of a catastrophic crash in the value of equity acquired during working life. A redistribution of property that insures a more equal starting point in life still cannot prevent the consequences of changes in value of that property over time—the risk still lies with the individual.

Both of these proposals subscribe, as do those who would privatize Social Security, to the premise that the free market is an essentially benign mechanism (once the redistributive stake has been handed out to individuals). Both proposals assume that the distributive power of the market will sort participants out according to some natural order once the starting point has been made more equal with the initial economic stake. In this liberal, Lockean vision, the key to democracy is to insure the autonomy and independence of individual members of society through decentralization of property ownership. Individual rights are to be founded on ownership of property, while social equity and economic access are assumed to follow naturally.

The overall thrust of these stakeholder notions is of redistribution by command on the basis of citizenship without any other eligibility criteria. The main weakness of plans to grant such an entitlement without regard to need, however, is the lack of justification for these grants apart from a socially determined goal of improving economic opportunity. Without a link to either earnings or need, there is little cultural precedent or context for an unconditional grant based on citizenship.

Neither stakeholder proposal directly addresses the issue of retirement income (although Ackerman and Alstott's funding proposal might affect the budget surplus widely advertised as being "saved" for Social Security).²⁶⁵ Yet the same difficulties would attend a society of stakeholders who reach retirement age having spent their stake on some activity or equity that provides no basis for retirement income as plagued the generation of savers who lost their personal stakes in the bank failures of the Great Depression. The economic rights that flow

²⁶⁴ See generally SHILLER, *supra* note 147.

²⁶⁵ See ACKERMAN & ALSTOTT, *supra* note 189, at 255–256.

from an equity stake, whatever its size or timing, can always be lost, even through no fault of the holder.

Perhaps an extended catastrophic collapse of values worldwide is now impossible given the market safeguards of the regulatory state for which Ackerman and Alstott apparently have so little use.²⁶⁶ Nonetheless, the inherent risks of equity cannot be cancelled out by equalizing incomes or access to property ownership at the beginning of a working life. Moreover, even if individuals are willing to assume the risks of a crash in the hopes of being a wealthy winner in the future, the institution of retirement demands certainty, not possibilities—at least for all but those who have equity to burn.

III. ENTITLEMENT VS. PRIVATIZATION IN THE RETIREMENT CONTEXT: A NEW NON-PROPERTY

The preceding discussion demonstrates that while the Social Security "problem" has been repeatedly characterized as either an economic or a demographic crisis, it is neither. Instead, it is a philosophical and ideological debate over proprietary individualism versus socially defined entitlement, over the primacy of the property right principle operating in the free market versus economic rights and redistribution based on effort rather than ownership. Moreover, as the examination of the ideas of Reich, Amar, Ackerman and Alstott reveals, the ideological power of the property right imperative is such that even those who advocate redistribution to further economic justice can apparently do so only in the context of a property-based concept of economic rights.²⁶⁷

My focus here is on retirement and the prevention of economic dependency and poverty in old age. This is a long-standing social goal and not the product either of modernity or even of the establishment of Social Security. The question is how best to accomplish this? Is it possible to guarantee economic security in old age without violating basic principles of market capitalism and of a democratic ideal? Privatization advocates argue that it is not—that the very existence of a public guarantee in the form of transfer payments distorts the workings of the market and cannot, in the end, be sustained without harmful levels of taxation.²⁶⁸ Redistribution, in this view, is inherently in

²⁶⁶ See *id.* at 254. But see SHILLER, *supra* note 147, at 203–233.

²⁶⁷ See *supra* notes 236–263 and accompanying text.

²⁶⁸ See FELDSTEIN, REFORM, *supra* note 7, at 5.

opposition to the competitive principles, incentives, and individual property rights upon which the market is based.²⁶⁹

In this final section, I suggest an alternate way of viewing the choices we face as a society in dealing with an increasingly older population. In many ways, this is a discussion about a trade-off between security and opportunity. Who benefits from this trade? Which principle provides greater likelihood of autonomy and at what point? Notwithstanding the centrality of the right to private property in American democracy, a tradition of rights based on labor and earning also has deep cultural roots and provides an alternative democratic tradition that can serve as the basis for an earnings-based entitlement that encompasses redistribution without contradiction.

A. *The Importance of Cultural Grounding of Rights*

The first element that must be recognized is the need for asserted rights to be grounded in historical cultural assumptions and accepted patterns of behavior. Governmental responsibility (at the town, village, city or state level) for caring for the poor has been acknowledged from the earliest colonial times as the heritage of the English Poor Law and later approaches to dealing with the poor.²⁷⁰ However, it is important not to lump together *poverty* programs in general with programs for the *elderly* or for *veterans*. Older persons who were known to have been productive members of the community were generally held to have a higher claim on community assistance than vagrant persons whose prior contributions to society were unknown.²⁷¹ Veterans, first in the Revolutionary War period and more broadly in the Civil War era, were presumed worthy of assistance, eventually without any demonstration of need.²⁷²

A major strength of earnings-based benefit programs is this cultural base of acceptance for assistance based on previous work. Indeed, the notion that labor brings rights with it is a pre-industrial human assumption, articulated as a natural right by Locke in his attempt to locate the creation of property rights in the act of adding labor to nature.²⁷³ This "workmanship ideal" is a strain of Western thought

²⁶⁹ See, e.g., Solomon & Barrow, *supra* note 7, at 14.

²⁷⁰ See *supra* notes 199–220 and accompanying text.

²⁷¹ See *supra* notes 199–220 and accompanying text.

²⁷² See *supra* notes 199–220 and accompanying text.

²⁷³ For example, according to Locke's labor theory of property rights, it would be the act of performing labor by picking and gathering apples that would make them one's

that supports widely divergent philosophic views, from Marx to Nozick to Sen.²⁷⁴

In the context of American social welfare programs, it is clear that some notion of workmanship provides a basis for popular acceptance of a right to assistance that is not based on need. In contrast, there is very little cultural basis for redistribution based solely on social justice. Even during Reconstruction, in the aftermath of the largest government "taking" of "property" in the history of the republic in the form of emancipation of slaves and abolition of the condition of slavery, wholesale redistribution of Southern property other than human beings was not widely demanded. Thaddeus Stevens' call for forty acres and a mule is less remarkable for its constitutional basis than for its failure to appeal to Northern voters who might have pressured Congress to take action to make sure newly freed slaves had the economic wherewithal to take control of their lives.²⁷⁵

As for programs for the poor, public attitudes have been quite consistent from pre-Revolutionary America forward—only those poor of demonstrated good character who have some reason acceptable to the majority for being poor are worthy of even grudging public assistance.²⁷⁶ Contempt for "the dole" did not originate with President Roosevelt, but rather is a persistent theme of American social welfare history.²⁷⁷ Public responsibility for the poor is accepted, but control of

property. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27 (J.W. Gough ed., 1976). In his *SECOND TREATISE*, Locke stated:

"Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person; This nobody has any right to but himself. The labor of his body, and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in he hath mixed his labor with, and joined it to something that is his own, and thereby makes it his property."

Id.

²⁷⁴ For a discussion of these varying offspring of Lockean property theory, see Ian Shapiro, *Resources, Capacities, and Ownership: The Workmanship Ideal and Distributive Justice*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 27-35 (John Brewer & Susan Staves eds., 1996).

²⁷⁵ See generally LEON LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1979); C. VANN WOODWARD, *REUNION & REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (2d ed. 1966).

²⁷⁶ See HABER & GRATTON, *supra* note 16, at 117-122.

²⁷⁷ See, e.g., Howell V. Williams, *Benjamin Franklin and the Poor Laws*, 18 SOC. SERV. REV. 77, 77 (1994). Benjamin Franklin's attitude toward poor relief was revealed in a 1773 letter: "I have sometimes doubted whether the laws peculiar to England, which compel the rich to maintain the poor, have not given the latter a dependence, that very much lessens the care of providing against the wants of old age." *Id.*

the circumstances of their receipt of assistance has been maintained via requirements such as good moral character and demonstrated inability to work so that public assistance is protected only by the goodwill of the government and the electorate.

Constitutional guarantees of due process are scant protection for poor people in the absence of broad-based public acceptance of the premises of assistance, as was clearly demonstrated by the 1996 welfare reform legislation.²⁷⁸ Thus, in the absence of clear need, or of past work history justifying assistance, it is difficult to see how any direct redistribution of property based solely on a goal of achieving economic equality could be accepted as having anything like the status of rights.

B. *The Risks of the Property Right Box*

The workmanship ideal can be seen as an alternative to the property right imperative driving proposals for privatization of Social Security. But the idea that an economic entitlement must be based on a property right to be recognized as a right in itself is clearly not confined to those who oppose redistribution. As demonstrated above, even legal analysts sympathetic to the principle of redistribution, who attempt to develop a theoretical and legal structure in which redistribution is a necessary and inevitable right, seem compelled to base their theories of rights protected by the Constitution, or of entitlements to be enacted by Congress, on property ownership.

In the old age income security context, basing entitlement on the connection between property and rights to future income is a trap which no theory can spring. The choice between certainty of private ownership combined with risk that may produce either poverty or wealth in old age is appealing to the individual but disastrous as social policy given the consequences for society at large if the gamble fails. Two factors make the old age income context different from the poverty program context: the possibility of work before retirement and the impossibility of predicting the future. The first factor provides a way to base a right on effort rather than property, to socialize the risk of poverty in old age for those who can be generally conceded to be worthy members of society—those who have worked. The second factor requires a basis for income promises other than property, whose value cannot be known until it is too late to acquire more through

²⁷⁸ See Edelman, *supra* note 247, at 550–51.

work, in the event the particular property proves not valuable enough to support living until death.

In the case of Social Security, simply because the payment of benefits in retirement after a lifetime of work looks very much like a private pension paid for by taxes does not mean that the payments are in any way based on equity. As discussed above, the most direct precedent for Social Security, other than the European social welfare programs, was the Civil War pension system, which was based not on property at all but on service.²⁷⁹ The direct right to a stream of income, a share of national productivity, is really the only way to fulfill the retirement promise, and Social Security is the embodiment of the retirement promise.

The alternative—a claim to future income based on accumulated property rights—cannot escape the fact that the security of the claim rests on the value of the property at the point the claim must be satisfied. Such a claim is inherently insecure, and if only the individual's well-being were at stake, the value of autonomy might demand that she be allowed to take that risk. This, indeed, is the premise and the vision of supporters of Social Security privatization: autonomy in deciding how to provide for one's old age and in bearing the risk of bad choices in exchange for the opportunity to gamble that private property values will pay out in one's favor in the future.

The fundamental risk associated with retirement is how to insure that one has enough income to provide for necessities until the end of life. The presumption in that phrasing of the risk is that the goal is self-sufficiency—autonomy at all stages of life upon reaching adulthood seems to be the fundamental value to be insured through our political and legal system. Moreover, this value is held in common both by those advocating continuation of the current Social Security system and those advocating privatization. The difference is that the fundamental result of public entitlement not based on private property is autonomy *in old age*, whereas the fundamental result of privatization is autonomous decision-making and risk taking *before old age*, including the risk of insufficient income at a time when the individual has little opportunity or ability to make up for bad luck or bad choices.

The debate has tended to focus on "investment" risk, contrasting the risk that the benefits individuals have earned under Social Security might not be there when they retire because of political decisions

²⁷⁹ See *supra* notes 199–220 and accompanying text.

beyond the individual's control against the risk that an individual will invest unwisely or have bad luck with the result that money put aside will not be there at retirement. Again, these are the two sides of autonomy at different points in time. But this formulation of the risk is focused on individual investment results, rather than social results. What do we find if we look at social risk, in addition to individual risk?

The possibility of insuring against *social* risk is at the heart of the philosophical and political debate over retirement income security. Social Security is simply the latest vehicle for a fundamental argument: is it possible to formulate and develop strategies to deal with "social risks," or is it illegitimate to even pose a problem as a "social" problem in a market-based society? In the 1930s, the problem seems to have been formulated this way: there is a social interest in preventing widespread poverty among those who are too old to be employed in industrial society in order to preserve social stability and encourage younger workers not to rebel against market-capitalism.²⁸⁰ The answer was Social Security—a socially mediated retirement income entitlement based on the culturally acceptable eligibility requirement of a lengthy work history and requiring no interference with autonomy in old age because it was not based on demonstrated need.

The alternative formulation since the late 1970s rejects any definition of the dilemma of old age income security in "social interest" terms and instead stresses individual interests and autonomous participation in a neutral marketplace prior to retirement. A private, equity-based individual accounts scheme allocates all of the risk of the market onto the individual, allowing the market to determine redistribution of income based essentially on chance. Such an individualized risk eliminates any notion of an entitlement to retirement income—hence the aggressive marketing campaigns cited earlier designed to play upon fear of old age and inadequate resources.

Yet non-investment-based risks also exist for individuals in a free market society: for example, the risk of a lifetime of low earnings in public education, or manual labor, or other poorly paid employment that makes savings for retirement difficult or impossible; the risk of substantial periods of unemployment because of changing technology; the risk of a poor education in underfunded public schools that

²⁸⁰ See ORLOFF, *supra* note 214, at 284–87 (noting that popular pressure from old age assistance movements impelled enactment of Social Security); see also BROWN, *supra* note 125, at 6 ("In the [Advisory] Council's view, the old-age insurance system was not a special arrangement for a segment of the American people, but a means of affording adequate protection against hardship for all gainfully employed persons throughout the country.").

leaves the individual with no opportunity to earn enough income to save for retirement. These risks are ignored in the private account system, except to the extent of setting up a minimal "safety net" for the poor whose gambles did not pay off.

A safety net, however, only deals with individual investment risk and does not address the social instability which only social insurance mitigates through its redistributive features. The fact that benefits are based on earnings, but that low earnings are weighted more heavily, means that lifetime low wage earners are given greater benefits than a strictly proportional formula would provide. While privatization advocates see this "combination of equity and adequacy" as a weakness of the program, it is the precise strength of the social insurance concept, because it combines entitlement derived from a widely accepted criterion—work—with redistribution that recognizes the social as well as economic value of work for low pay. It is this recognition that allows Social Security to insure against social risks as well as the individual risks that exist outside of market returns.

C. The Importance of Being Entitled: The New Non-Property

Finally, what is the significant advantage of an earnings-based entitlement, as opposed to a private plan supplemented by a publicly funded welfare safety net? Can there be a theoretically defensible basis for entitlement to income security other than private property? Why should a right to future income—represented by Social Security—be a better candidate for entitlement status than, say, a right to a college education to prepare for work, or a right to quality day care to insure a better start in life? The answers lie largely in the particular characteristics of the institution of retirement.

Social Security represents a right to future consumption based on current work effort, unmediated by any property right the value of which could rise or fall over time. Social Security represents a different kind of right—not property, but rather, a right to an income stream *without* mediation through property. This is essential to the institution of retirement, which is based on the vast majority of Americans making the decision to stop work because they have a secure income right for the rest of their lives. An equity-based right simply cannot provide certainty in value or amount of income.

The concrete results of income rights based on equity for the elderly, who no longer have many choices about engaging in productive activity that is rewarded in the marketplace, were demonstrated in the 1930s—a property right claim on future productivity can wither in

the face of economic devaluation. It is the *value* of the property, not the property itself, that will satisfy the claim for consumption in retirement. The current emphasis on equity as the basis of economic well-being is essentially a type of resistance to modernity and abstraction of economic value—something like clinging to the gold standard in the face of modern floating currency systems.

Moreover, the income entitlement of Social Security is a right in the pursuit of a specific objective—the social institution of retirement. If retirement is a socially constructed institution that satisfies pressing needs (recycling of workers, social stability) rather than a natural phenomenon, social insurance and redistribution can be seen as a way to support that institution and its objectives. Privatizers, in contrast, look at retirement not as a socially constructed institution in service of specific objectives but as a natural phenomenon arising out of individual choice (consistent with their philosophical framework of autonomous individuals operating in the competitive marketplace). The latter perspective is essentially ahistorical and ignores the fact that there was no broad-based retirement expectation or reality before enactment of the public retirement income entitlement.

There remains the issue of due process and the question of the status of benefits as property or as something else. Reich failed in his effort to have public benefits of all sorts accepted as a form of property, which would have given recipients procedural due process rights—essentially the right to a hearing before benefits could be taken away. Such a right is significant in the context of benefits based on need, which is assumed to be a temporary condition; the fundamental principle of family needs-based assistance has always been that the assistance will only be needed for a finite period of time (until the children are grown, for example, or until work can be found). Retirement benefits, however, are essentially useless if they are not permanent. The whole idea of providing retirement benefits is to assure a permanent income stream until death, and the institution of retirement is built around that assumption. Therefore, due process rights, which guarantee a fair hearing before deprivation of property, are hardly significant where the statutory structure of the retirement benefit assures that benefits, once begun, will continue until death.

But how secure can a public entitlement actually be if it does not have the constitutionally protected status of property and can be changed at any time by Congress? The lessons of welfare reform should not be lost on those who advocate for the poor as well as for the elderly: the minimal procedural due process protections afforded welfare benefits were insufficient to preserve them in the face of pub-

lic hostility to "the dole." In the absence of a widely accepted basis for providing assistance (other than need, which has never been enough for more than an extremely minimal, conditional payment to the poor), welfare benefits were not safe from legislative elimination.

Social Security, on the other hand, has faced several short-term financing crises in the last thirty years—primarily in the late 1970s and early 1980s—and Congress has repeatedly acted quickly to address the shortfalls without any serious question of eliminating or drastically scaling back benefits.²⁸¹ This political untouchability has led pundits to label Social Security "the third rail of American politics" and critics to lament the inability of politicians to make tough choices and dramatically revise the program's benefits and financing. Yet there is no particular constitutional protection afforded Social Security any more than there was for public assistance based on need. The "right" status of the public earnings-based entitlement is founded in the public perception that such a right exists—and that perception is enforced through the political legislative process. In other words, citizens have a right to their Social Security benefits because they have accepted the program as their right, based on their years of earnings and contributions in taxes. Moreover, this entitlement right is a right in service and protection of the social institution of retirement and as such can begin to be thought of seriously as a right rather than simply a political claim.²⁸²

The entitlement to income represented by Social Security is important not only for instrumental reasons—that it is the best tool for accomplishing the social policy goals of mass retirement and social stability in the face of economic downturns—but because entitlement is essential as the basis of democracy. Needs-based benefits are inevitably cast as a gift, albeit for good policy reasons, and the very act of giving—whether in the context of a government welfare program or a private donation—inescapably creates an unequal relationship. The donor, either the individual or taxpayers in the aggregate, occupies the high ground in every way; control over the timing and amount of the gift and over the identity of the donee automatically confers on the donor the superior role. Entitlement, in contrast, creates no particular relationship between the entitled person and the source of the benefit precisely because it is a right generated from the recipient

²⁸¹ See EDWARD D. BERKOWITZ & KIM MCQUAID, *CREATING THE WELFARE STATE: THE POLITICAL ECONOMY OF 20TH CENTURY REFORM* 200-01 (1922).

²⁸² For a discussion of rights in service of a positive social objective, see generally Pildes, *supra* note 10.

herself—through earnings—and thus carries no implication of an unequal power relationship.

The clear consensus of historians is that broad-based retirement, understood as the voluntary cessation of work in spite of continued ability and opportunity to work, is a product of industrialization.²⁸³ If the retirement decision must be based on certainty of income to the end of life, privatization with its inherent allocation of risk onto the individual would very likely spell the end of mass retirement as it currently exists. If we assume that retirement is still a necessary part of the economic structure, privatization clearly poses grave institutional dangers as well as dramatic increases in individual risk. The question for the twenty-first century, therefore, should be, at least in part, a re-examination of the necessity and desirability of age-based (as opposed to disability or unemployment-based) retirement.

CONCLUSION: DECONSTRUCTING AESOP'S ANT

Aesop's fable of the grasshopper and the ant, with which this Article began, contains several important themes which pervade the privatization debate. First, Aesop's story teaches not only the wisdom of saving but also the moral worth of those who save and, by extension, of those who have the ability, luck or endowment (both genetic and financial) to produce more than they can consume and thus to save that excess production for future consumption. Financial investment advisors infuse their advertising with this sense of moral well-being attaching to thrift, savings and investment savvy, usually contrasting the older saving generation with the younger baby boom spender who has nothing to live on in retirement except Social Security and whose future, it is implied, is dubious at best.²⁸⁴

Moreover, the grasshopper only survives at the end of the fable through the charity of the ant who graciously agrees to share her stored up grain (and, one supposes, never ceases to remind the grasshopper of her generosity). The modern debate also echoes this part of the fable as the answer to complaints that a solely private and individualized retirement savings plan, such as those being currently de-

²⁸³ See Dilley, *supra* note 200, at 1102–06.

²⁸⁴ One commentator has noted: "Today, you're likely to get less help in retirement from your employer and from the cash-strapped Social Security system than your parents did. Therefore, you'll be less likely to have 70% to 80% of your peak earnings at your disposal when you stop working full time." Peter Keating, *You Can Afford the Lifestyle You Want*, MONEY, Oct. 1996, at 94, 96.

bated in Congress and elsewhere,²⁸⁵ would result in many older Americans arriving at retirement age with insufficient funds to support them until death. For the supporter of private accounts, the solution to the potential problem of increased poverty amongst the elderly is public and private charity.²⁸⁶ Charity, of course, whether public welfare or private gratuities, has the dual advantage of reminding the recipient of his profligacy in failing to provide for his old age himself while allowing the giver to congratulate herself on her own moral and intellectual superiority in being a financial winner.

Finally, the fable presents the ant's solution to winter starvation as wealth building. By restricting her consumption in the present and setting aside those grains of wheat to consume over the winter, the ant has built herself an equity nest-egg, one which, in the event she does not consume it completely over the winter, would be available for her children to inherit (subject, of course, to the vagaries of ant inheritance practices). The grasshopper, in eating and playing over the summer, has in effect not only consumed his own ability to survive but also provided nothing for his family to eat after his own demise. Privatization proposals similarly rely on equity—stock, real estate, other property—as a basis for financial security in retirement and, not incidentally, of wealth to pass on at death to family or other heirs. Supporters of these arrangements assert that private entitlement in the form of private property is superior to public entitlement in the form of Social Security primarily because Social Security does not build individual equity and thus provides no opportunity for wealth transfers at death.

One problem, however, with using the ant-equity analogy as a guide for human retirement planning is the time-frame for retirement. The fallow winter season of unproductive activity, through which the ant's stored goods are intended to carry her, is of predictable and relatively short duration. In contrast, the human lifespan after age fifty has expanded substantially since 1900 to eighty and beyond at least in the developed world.²⁸⁷ Predictions of genetic breakthroughs that promise regular and healthy active lifespans of

²⁸⁵ See S. 1103, 106th Cong. § 1 (1999); H.R. 3206, 106th Cong. § 1 (1999) (proposing legislation for privatizing or partially privatizing social security); H.R. 1793, 106th Cong. § 1 (1999); H.R. 874, 106th Cong. § 1 (1999).

²⁸⁶ See, e.g., Nickles, *supra* note 34, at 96.

²⁸⁷ See JOSEPH S. PIACENTINI & JILL FOLEY, EMPLOYEE BENEFIT RESEARCH INSTITUTE, EBRI DATABOOK ON EMPLOYEE BENEFITS 459 (2d ed. 1992).

over 100 in the near future mean increased uncertainty about the length of time retirement income will be needed.²⁸⁸

But there is an even more fundamental problem with using the grasshopper-ant fable as a model for contemporary retirement income security policy: provision for one's old age cannot be based on setting aside actual goods for consumption in the future. Rather, retirement savings in all forms represent a claim on future production of the goods and services that must be consumed in old age after the individual has stopped economically productive activity.²⁸⁹ Financial equity—shares of stock, for example—cannot itself be consumed; it must be liquidated in order to finance the purchase of consumable goods, either all at once, through sale of the equity itself, or gradually through the distribution of dividends representing the earnings underwriting its value.

It is the value of the equity at the time of necessary consumption (paying for long-term health care, for example) that will determine how well the elderly individual will live, and that value will be determined by the state of the economy at the point of consumption in the future. Such a future value is quite difficult to predict forty or even five years in advance, depending on the type of equity involved. Historically, accumulation of enough equity to insure income until death has been rare, as human beings have tended to remain in the productive work force until disability from advancing age forced an exit. Thus, insuring sufficient income until death is a perennial human concern.

However, while *aging* is a natural stage of life, one that promises to extend further and further as this century progresses, *retirement* without disability, particularly for the middle and working classes, is a social institution created to meet the needs of the industrial society of the twentieth century. Prior to the enactment of Social Security, retirement was a minority phenomenon available only to those with sufficient equity to insure a stream of income for the relatively brief period of post-work life in old age. For all but the very wealthy in nineteenth and early twentieth century America this was usually the

²⁸⁸ See Steve Farrar, *Today's Babies Can Expect to Live to 130*, LONDON SUNDAY TIMES, Feb. 14, 1999; Nick Nuttall, *Life Could Begin at 100 if Scientists Have Their Way*, LONDON TIMES, Aug. 30, 1993; Shankar Vedantam, *Skip the Food and Sex and Live to Age of 170*, DEN. POST, June 30, 1996, at A36.

²⁸⁹ To some extent, housing may be an exception to this rule if the retired person has paid off a mortgage on a family home, but even in that case there are maintenance and property tax expenses that still have to be paid throughout retirement.

family farm being worked by adult children under a promise of inheritance.²⁹⁰ The mid-twentieth century development of the institution of voluntary retirement at sixty-five or earlier for almost all workers, regardless of physical or mental capacity for continued work, has been based on the understanding that claims on future goods and services will be satisfied through a permanent entitlement to a lifetime stream of income in retirement in the form of Social Security benefits.²⁹¹

The Social Security privatization debate has devolved into a dreary recitation of the virtues of saving in order to meet future retirement needs. The rewards of a lifetime of equity investing are presented as the smart alternative to the poor "return on investment" offered by Social Security and the perceived risks of reliance on a future stream of income secured not by a property interest but by political consensus. The real "crisis" in Social Security, however, is usually seen as the challenge of supporting the public retirement program in the face of a demographic shift—too many retirees to be supported by too few workers. The solution most frequently discussed is partial or full "privatization"—that is, transforming the public right represented by entitlement to social security retirement income into private property rights represented by individual accounts.

Yet even in the midst of this fairly high level of public concern about the social resources necessary to support an aging population, retirement at relatively early ages, long before the aging process takes a real toll on productive capacity, is being marketed to the American public in a remarkably golden and optimistic light. The typical advertisement for financial investment firms seeking clients to invest retirement savings pictures an older, but not elderly, couple, enjoying life at the seashore or on the golf course, with no physical or mental impairments. The clear message is that retirement is not only the primary goal of a working life, it is a halcyon period in which Americans can expect a better life than they had while they were working. Retirement has become the goal of working itself—the new secular heaven. This is one reason why privatization's real focus is wealth-building and risk-taking rather than retirement security.

Clearly, however, the two major problems presented by those who argue for privatization—the need for higher rates of return, and too

²⁹⁰ See GRAEBNER, *supra* note 16, at 14.

²⁹¹ See *id.* at 162–63 ("Workers were entitled to pensions after a long and useful life in industry.").

few workers supporting too many retirees—cannot be solved by the same measure. Higher investment returns, by their nature, are likely for some, but not all, of those saving for retirement. Those savings have to be cashed in at retirement and ultimately represent a claim on productivity at that moment in time. If there are really too few workers in the twenty-first century to support all retirees when their claims are cashed in, the only solution is to have fewer retirees. While few of those supporting dramatic reductions in public redistributive social insurance would characterize it as a major goal of privatization, reducing the number of retirees might in fact be its most widely-felt result.

It may well be true that retirement as a social mechanism has outlived its usefulness in an era of apparent labor shortages and increasing opportunities for older workers to change careers and continue working well into old age. The debate so far, however, has yet to directly address the end of retirement as a probable or even possible result of privatization, focusing instead on the upside possibilities of market investment and largely ignoring the downside both for individuals and for society as a whole.

Ultimately, the retirement entitlement is meaningless in the context of a system based on risk. The upside possibility of making a killing in the market is unlikely to be an adequate substitute sufficient to sustain mass levels of retirement for the certainty of an income stream in retirement for millions of average and low wage workers. The very taking of the risk, in addition, tends to change the attitude of the average person from that of a critical citizen to that of a self-interested private investor—to the benefit of the companies being invested in but perhaps at the expense of civic participation and identification of public, as opposed to private, interest and needs.

Aesop's ant has served as the model of thrift, industry and self-denial—indeed as the precursor and embodiment of the Protestant ethic—for over 2000 years. It may, however, be time for the ant herself to retire. In a fluid twenty-first century economy, where the property right itself may no longer have the resonance it has had over the centuries of development of Western common and civil law, the public and legal scholars alike may begin to be more comfortable with the notion of rights to future income unconnected to the property paradigm. Such a shift in perspective seems certain to be the only sound basis for continuation of the institution of old-age retirement very far into the future.